DOCKET

(10)

No. 88-1105-CFX
Status: GRANTED

Title: Curtis Guidry, Petitioner
v.
Sheet Metal Workers National Pension Fund, et al.

Docketed:
December 31, 1988

Court: United States Court of Appeals
for the Tenth Circuit

Counsel for petitioner: Silverman,Eldon E.

Counsel for respondent: Brauer III,Walter C.,
Goldhammer,Joseph M.

Entry	Date	Note	Proceedings and Orders
1	Dec 31 1988	G	Petition for writ of certiorari filed.
2	Feb 3 1989		Brief of respondent Sheet Metal Workers Natl. Pension Fund in opposition filed.
3	Feb 8 1989		DISTRIBUTED. February 24, 1989
4	Feb 27 1989	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
5	Jun 5 1989		Brief amicus curiae of United States filed.
6	Jun 6 1989		REDISTRIBUTED. June 22, 1989
7	Jun 15 1989	X	Supplemental brief of respondent Sheet Metal Workers Natl. Pension Fund filed.
8	Jun 26 1989		Petition GRANTED.
			**********
9	Aug 9 1989		Brief amicus curiae of United States filed.
10	Aug 9 1989		Joint appendix filed.
11	Aug 9 1989		Brief of petitioner Curtis Guidry filed.
13	Aug 18 1989		Order extending time to file brief of respondent on the merits until October 2, 1989.
14	Aug 18 1989	D	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
15	Sep 6 1989		Record filed.
		*	Certified copy of original record and proceedings received.
16	Sep 25 1989		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument DENIED. Justice Blackmun would grant the motion.
17	Sep 26 1989		SET FOR ARGUMENT WEDNESDAY, NOVEMBER 29, 1989. (4TH CASE)
18	Oct 2 1989		Brief of respondent Sheet Metal Workers National Pension Fund filed.
20	Oct 5 1989		CIRCULATED.
21	Oct 30 1989	X	Reply brief of petitioner Curtis Guidry filed.
22	Nov 29 1989		ARGUED.

PETITION FOR WRIT OF CERTIORARI

88-1105

Supreme Court, U.S.
FILED
DEC 31 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. ____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

CURTIS GUIDRY,

Petitioner,

v.

SHEET METAL WORKERS NATIONAL PENSION FUND;
SHEET METAL WORKERS' LOCAL UNIONS AND COUNCILS PENSION PLAN;
SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 9;
SHEET METAL WORKERS LOCAL NO. 9 PENSION FUND; et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Shaw, Spangler & Roth
Richard H. Shaw
1700 Broadway, Suite 1400
Denver, Colorado 80290
(303) 861-2223
(Counsel of Record)

Silverman and Gelman, P.C.
Eldon E. Silverman
1600 Stout, Suite 1000
Denver, Colorado 80202
(303) 573-5266

Elrod, Katz, Preeo & Look, P.C.
Kenneth T. Eichel
1120 Lincoln, Suite 1100
Denver, Colorado 80203
(303) 832-1900
Counsel for Petitioner

QUESTIONS PRESENTED

I. Should the Court resolve conflicting decisions of the Second and Sixth Circuits on one hand, and the D.C., Tenth and Eleventh Circuits on the other hand, regarding whether a Court can create a "criminal conduct exception" to the explicit anti-alienation provisions of the Employee Retirement Income Security Act of 1974 ("ERISA")?

II. Should this Court reverse a clearly erroneous conclusion by the Court of Appeals in this case, contrary to the record below, that Petitioner Guidry failed to raise the 75% exemption provided by the Consumer Credit Protection Act in the District Court?

LIST OF PARTIES

The parties to this case, as defined by Rule 19.6, are Petitioner Curtis Guidry and Respondents Sheet Metal Workers National Pension Fund; Sheet Metal Workers International Association, Local 9; Sheet Metal Workers Local No. 9 Pension Fund; Edward J. Carlough, Robert T. Stringer, C.T. Roff and Cavet Snyder, Trustees; Sheet Metal Workers' Local Unions and Councils Pension Plan and Edward J. Carlough, Cecil D. Clay, George J. Cuddihy, Urie E. Williams, Jr. and Richard J. Scott, Trustees.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

PARTIES i

TABLES OF AUTHORITIES iii

OPINIONS BELOW 2

JURISDICTION 2

PERTINENT STATUTES 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING CERTIORARI 6

I. THERE IS A CONFLICT AMONG AT LEAST FIVE COURTS OF APPEAL ON THE ISSUE OF WHETHER COURTS CAN CREATE EXCEPTIONS TO THE ANTI-ALIENATION PROVISIONS OF ERISA, DESPITE CLEAR LEGISLATIVE LANGUAGE TO THE CONTRARY 6

II. THE COURT OF APPEALS CLEARLY ERRED IN REFUSING TO CONSIDER THE 75% EXEMPTION ISSUE, EVEN IF A JUDICIALLY-CREATED EXCEPTIONS TO ERISA IS ALLOWED, SINCE THE ISSUE OF THE EXEMPTION WAS RAISED IN THE DISTRICT COURT 7

CONCLUSION 8

APPENDICES 10

TABLE OF AUTHORITIES

PAGE

Cases

Crawford v. La Boucherie Bernard, Ltd., 815 F.2d 117 (D.C. Cir. 1987), *Cert. denied*, 108 S. Ct. 328 (1987) 6

Cummings By Techmeier v. Briggs & Stratton Retirement Plan, 797 F.2d 383 (7th Cir. 1986), *Cert. denied*, 107 S. Ct. 648 (1986) 6

Ellis Nat'l Bank of Jacksonville v. Irving Trust, 786 F. 2d 466 (2d Cir. 1986) 6

Mackey v. Lanier Collections Agency and Serv., 108 S. Ct. 2182 (1988) 8

St. Paul Fire & Marine Ins. v. Cox, 752 F.2d 550 (11th Cir. 1985) 6

United Metal Prods. v. National Bank of Detroit, 811 F.2d 297 (6th Cir. 1987), *Cert. denied*, 108 S. Ct. 1494 (1988) 6

Statutes

Consumer Credit Protection Act
15 U.S.C. § 1672(a) 2, 7
15 U.S.C. § 1672(c) 2, 7

Employee Retirement Income Security Act of 1974
29 U.S.C. § 1053(a) 3
29 U.S.C. § 1056(d)(1) 2, 4, 6

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

No. _____

CURTIS GUIDRY,

Petitioner,

v.

SHEET METAL WORKERS INTERNATIONAL PENSION FUND;
SHEET METAL WORKERS' LOCAL UNIONS AND COUNCILS PENSION PLAN;
SHEET METAL WORKERS NATIONAL ASSOCIATION, LOCAL 9;
SHEET METAL WORKERS LOCAL NO. 9 PENSION FUND; et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner Curtis Guidry ("Guidry") respectfully petitions this Court for a writ of certiorari to review the Tenth Circuit Court of Appeals decision in this proceeding.

OPINIONS BELOW

The Tenth Circuit opinion, reproduced as Appendix A, is reported at 856 F2d 1457. The opinion of the District Court for the District of Colorado is not officially reported and is reprinted in Appendix B.

JURISDICTION

The Tenth Circuit entered its opinion and judgment on August 24, 1988. A Petition for Rehearing was filed on September 7, 1988, and the Petition for Rehearing was denied on October 3, 1988. This Court's jurisdiction to review the Tenth Circuit's opinion and judgment arises under 28 U.S.C. § 1254(1).

PERTINENT STATUTES

The Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, provides in 29 U.S.C. § 1056(d) as follows:

> Each pension plan shall provide that the benefits provided under the plan may not be assigned or alienated.

The Consumer Credit Protection Act provides the following definitions of "earnings" and of "garnishment," at 15 U.S.C. § 1672:

(a) The term "earnings" means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program.

(c) The term "garnishment" means any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt.

STATEMENT OF THE CASE

Petitioner Guidry agrees generally with the statement of the facts both in the Tenth Circuit Court of Appeals opinion and judgment in Appendix A, and the memorandum opinion and order of the District Court in Appendix B.

Those opinions reveal that Petitioner Guidry, between 1964 and 1981, served as business manager and chief executive officer of Respondent Sheet Metal workers National Association, Local 9 (the "Union"). At the same time, Petitioner Guidry participated in three separate pension funds which were legally and organizationally separate from the Union, namely, Respondents Sheet Metal Workers National Pension Fund, the Sheet Metal Workers' Local Unions and Councils Pension Plan, and the Sheet Metal Workers' Local 9 Pension Fund ("Pension Plans").

In 1982, Petitioner Guidry plead guilty to a violation of 29 U.S.C. § 501(c) for embezzlement from the Union (as opposed to any crime or violation against the Pension Plans).

Petitioner Guidry served a prison term for the crime against the Union. Petitioner Guidry applied for and was denied retirement benefits by the Pension Plans, and brought suit in the District Court seeking recovery of pension plan benefits from September 30, 1981 to present.

The Pension Plans filed a Motion for Summary Judgment in the District Court that no benefits were owed because Petitioner Guidry was never a "participant" nor a "covered person" under the Pension Plans due to his misconduct against the Union. The District Court upheld the nonforfeiture provisions of ERISA at 29 U.S.C. § 1053(a), holding that, "(t)hat provision precludes forfeiture of pension benefits because of the employee's misconduct." Appendix B–3.

The District Court further held that the Pension Plans' assertion that Petitioner Guidry was never eligible for benefits because of his misconduct, "is contrary to Section 1053(a) and precedent. Forfeiture is precluded even in these circumstances,

and Petitioner Guidry is entitled to his vested pension benefits as a matter of law." Appendix B–3.

The District Court, as shown in its opinion in Appendix B, however, dealt differently with the anti–alienation provisions of ERISA in 29 U.S.C. § 1056(d)(1), which provide that benefits "may not be assigned or alienated." The District Court recognized that the language was unconditional; however, it found that none of the precedent dealt with a union and carved out a judicial exception by imposing a constructive trust in favor of the Union against the pension funds of Petitioner Guidry, until moneys owed the Union were satisfied.

As part of the collection process, the Union caused various writs of garnishment to issue, and traverses to the writ of garnishment were filed by the various pension funds, denying liability. It is clear that the District Court took up the issue of the garnishments, as well as the 75% exemption of funds arising out of the Consumer Credit Protection Act. As shown in the transcript of the District Court's hearing, the Court, in Appendix C–2, lines 19, 23 and 24, stated as follows:

> We are here to consider several matters... There is also a traverse to answers to writs of garnishment.

The following exchange took place between the Court and counsel for Petitioner Guidry, showing that the issue of exemption was raised and ruled on by the District Court, at Appendix C–22, lines 19–25, and C–22, lines 1–8, as follows:

> THE COURT: Yes, Mr. Serruto, do you see it differently? Obviously you see it differently in terms of the final result, but in terms of the mechanics, I don't see that we can do it any other way, do you?
>
> MR. SERRUTO: Your Honor, this eliminates the possibility of bringing before the Court the issue of the exemptions to which Mr. Guidry needs to place before the Court.

> THE COURT: No. This isn't a garnishment. I am imposing a constructive trust. There are no exemptions. I am not going down that garnishment road.
>
> MR. SERRUTO: The position of the Court would then be he is entitled to no exemptions then?
>
> THE COURT: That's right, He doesn't get anything until $275,000 plus interest has been paid, the way I see it.

Appeal from the District Court's adverse ruling was taken to the Tenth Circuit Court of Appeals involving the application of the anti–alienation provisions, and the issue that even if the constructive trust were proper, that under the Consumer Credit Protection Act, 75% of any funds of Petitioner Guidry were exempt from garnishment. The Court of Appeals, as shown in its opinion in Appendix A, noted that the Second and sixth Circuits have refused to create judicially carved out "criminal conduct exceptions" to the anti–alienation provisions of ERISA, but felt more comfortable with the decisions of the D.C. Circuit and the Eleventh Circuit, carving out a judicially–created exception, even though the conduct was not against the Pension Plans, but a separate entity, namely, the Union.

With regard to the 75% exemption issue, the Tenth Circuit Court of Appeals refused to consider it, holding that Petitioner Guidry "should have then responded to the Union's writ seeking all his pension benefits, by bringing the exemption restriction of the Consumer Credit Protection Act to the court's attention." Appendix A–11 . The Court went on to hold that, since "(T)he issue of the exemption was not properly before the district court; therefore, we refuse to consider it." Appendix A–11.

This writ is being filed both because there is a definite conflict in the Circuits on whether courts can ignore a clear Congressional edict against alienation of plan benefits, and also, because the Court of Appeals was clearly mistaken in holding that Petitioner Guidry never raised the 75% exemption issue in the District Court.

REASONS FOR GRANTING THE CERTIORARI

I. THERE IS A CONFLICT AMONG AT LEAST FIVE COURTS OF APPEAL ON THE ISSUE OF WHETHER COURTS CAN CREATE EXCEPTIONS TO THE ANTI-ALIENATION PROVISIONS OF ERISA DESPITE CLEAR LEGISLATIVE LANGUAGE TO THE CONTRARY.

The Tenth Circuit Court of Appeals, in its opinion, recognized that there was a conflict in the Circuits on the issue of court-created exceptions to the clear anti-alienation provisions in 29 U.S.C. § 1056(d)(1). The Court pointed out that the Second Circuit, in *Ellis Nat'l Bank of Jacksonville v. Irving Trust*, 786 F.2d 466 (2d Cir. 1986), and the Sixth Circuit, in *United Metal Prods. v. National Bank of Detroit*, 811 F.2d 297 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 1494 (1988), refused to find any exceptions for criminal misconduct in ERISA. It is Petitioner Guidry's position that the Seventh Circuit also supports the Second and Sixth Circuits against judicially-created exceptions. In *Cummings By Techmeier v. Briggs & Stratton Retirement Plan*, 797 F.2d 383 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 648 (1986), the Court was faced with a situation, where a decedent who was an employee and participant in the pension fund, was required by a divorce decree to change the beneficiary to the name of his minor child. The participant failed to so elect prior to this death, and as the Court of Appeals held, "where Congress has established an extensive regulatory network and expressly announced its intention to occupy the field, federal courts should not create additional rights under the rubric of federal common law." *Cummings By Techmeier v. Briggs & Stratton Retirement Plan*, supra, 797 F.2d, at 390.

Rather than agreeing with the second, Sixth and Seventh Circuits, the Tenth Circuit Court of Appeals in this case chose to follow decisions of the D.C. Circuit and the Eleventh Circuit Court of Appeals in *Crawford v. La Boucherie Bernard, Ltd.*, 815 F.2d 117 (D.C. Cir. 1987), Cert. denied, 108 S. Ct. 328 (1987), and *St. Paul Fire & Marine Ins. v. Cox*, 752 F.2d 550 (llth Cir. 1985).

Obviously, Guidry prefers the reasoning of the Second, Sixth and Seventh Circuits; however, the pros and cons should be argued if the Writ is granted. Needless to say, the issue of judicially-created exceptions to ERISA seems to be arising frequently if at least six separate Circuit Courts of Appeal decisions exist and are evenly split. Therefore, it is of importance that these conflicts be resolved so that an important piece of legislation, namely, ERISA, may be clearly and consistently applied throughout the land.

II. THE COURT OF APPEALS CLEARLY ERRED IN REFUSING TO CONSIDER THE 75% EXEMPTION ISSUE, EVEN IF A JUDICIALLY-CREATED EXCEPTION TO ERISA IS ALLOWED, SINCE THE ISSUE OF THE EXEMPTION *WAS* RAISED IN THE DISTRICT COURT.

The Court of Appeals indicated that Petitioner Guidry should have responded to the Union's writ of garnishment by "bringing the exemption restriction of the Consumer Credit Protection Act to the court's attention." Appendix A-11. The Court of Appeals further held that, "The issue of the exemption was not properly before the District Court; therefore, we refuse to consider it." Appendix A-11.

The Tenth Circuit Court of Appeals is clearly wrong, and a substantial injustice was done to Petitioner Guidry, who has already paid his debt to society through the criminal justice system, and by serving his sentence. Even if the criminal conduct exception is allowed to stand, Petitioner Guidry is entitled to the 75% exemption provided by the Consumer Credit Protection Act. The Act in 15 U.S.C. § 1672(a), clearly provides that "earnings" includes "periodic payments pursuant to a pension or retirement program." Further, in 15 U.S.C. § 1672(c), "garnishment" means "any legal or equitable procedure through which the earnings of an individual are required to be withheld for payment of any debt."

Contrary to the Court of Appeals' opinion, it is clear that Petitioner Guidry raised the exemption issue in the District

Court. As shown in Appendix C-2 , lines 19, 23 and 24 of the Trial Court proceeding, the District Court stated itself that, "We are here to consider several matters... There is also a traverse to answers to writs of garnishment." The Trial Court, further, as shown at Appendix C-21 and C-22 and , clearly considered and ruled on the exemption issue. Counsel for Petitioner Guidry clearly brought to the Court's attention the issue of exemptions, and the following interchange took place at Appendix C-22, lines 5-8:

> MR. SERRUTO (counsel for Guidry): The position of the Court would then be he is entitled to no exemptions then?
>
> THE COURT: That's right, He doesn't get anything until $275,000 plus interest has been paid, the way I see it.

A severe injustice regarding needed pension funds would be done if this Court ignored the clear error of the Court of Appeals in refusing to consider the garnishment issue. In a recent case, this Court in *Mackey v. Lanier Collections Agency and Serv.*, 108 S. Ct. 2182 (1988), stated that ERISA's anti-alienation provision precludes garnishment of pension benefits. Thus, from the viewpoint of that decision, no amounts should be garnished at all; however, at the very least, Petitioner Guidry would ask the Court to consider the issue of whether the 75% exemption under the Consumer Credit Protection Act applies.

CONCLUSION

Six different Circuit Courts of Appeal have now issued conflicting opinions regarding the ability of the courts to create judicial exceptions to the clear legislative language of the anti-alienation provisions of ERISA. The second, Sixth and Seventh Circuits are on one side of the issue, and the D.C., Tenth and Eleventh Circuits are on the other side of the issue. This conflict must and should be resolved.

Further, such an important matter as a person's pension fund being at stake, the error of the Court of Appeals in failing to provide for the 75% Consumer Credit Protection Act exemption to Petitioner Guidry, under the erroneous assumption that the exemption was not raised in the District Court, must also be corrected.

December, 1988

Respectfully submitted,

Shaw, Spangler & Roth

By: Richard H. Shaw 1700
Broadway, Suite 1400
Denver, Colorado 80290
(303) 861-2223
(Counsel of Record)

Silverman and Gelman, P.C.
Eldon E. Silverman
1600 Stout, Suite 1000
Denver, Colorado 80202
(303) 573-5266

Elrod, Katz, Preeo & Look, P.C.
Kenneth T. Eichel
1120 Lincoln, Suite 1100
Denver, Colorado 80203
(303) 832-1900

(Counsel for Petitioner)

APPENDICES

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

No. 86-2323

CURTIS GUIDRY,

Plaintiff-Appellant,

v.

SHEET METAL WORKERS NATIONAL PENSION FUND, and EDWARD J. CARLOUGH, ROBERT T. STRINGER, C.T. ROFF, and CAVET SNYDER, Trustees; SHEET METAL WORKERS' LOCAL UNIONS AND COUNCILS PENSION PLAN and EDWARD J. CARLOUGH, CECIL D. CLAY, GEORGE J. CUDDIHY, URIE E. WILLIAMS, JR., and RICHARD J. SCOTT, Trustees,

Defendants-Appellees,

and

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL NO. 9,

Intervenor-Appellee,

and

SHEET METAL WORKERS LOCAL NO. 9 PENSION FUND,

Rule 19 Party-Appellee.

Appeal from the United States
District Court For the District of Colorado
D.C. No. 84-M-879

Eldon Silverman (Michael P. Serruto with him on the briefs) of Elrod, Katz, Preeo & Look, P.C., Denver, Colorado, for Plaintiff-Appellant.

Joseph M. Goldhammer of Brauer & Buescher, P.C. (Raymond J. Sweeney, Washington, D.C., with him on the brief), Denver, Colorado, for Defendants-Appellees.

Before HOLLOWAY, Chief Judge; MOORE, Circuit Judge; and RUSSELL,* District Judge.

MOORE, Circuit Judge:

This is an appeal from the district court's order placing a constructive trust upon plaintiff's pension benefits. The trust was imposed to allow recovery of a judgment obtained by the Sheet Metal Workers' International Association, Local No. 9 (the Union), for money embezzled by Mr. Guidry from the pension fund. Plaintiff argues that the anti-alienation provision of ERISA (the Act) should have precluded the district court from placing his pension benefits in a constructive trust. Plaintiff also claims that imposition of a constructive trust must be limited to funds linked to his embezzlement and traceable into the pension funds, or, alternatively, that seventy-five percent of pension benefits must be exempted from the constructive trust because of garnishment restrictions in the Consumer Credit Protection Act. We are not persuaded by these arguments and affirm the district court's decision.

From 1964 until 1981, Mr. Guidry served as business manager and chief executive officer of the Union. During

* Honorable David L. Russell, United States District Judge for the District of Oklahoma, sitting by designation.

approximately the last five years of this period, Mr. Guidry was also a trustee of the Union's pension fund. When he resigned as business manager, the Union commissioned an audit which concluded that nearly $1,000,000 had been stolen from it. In March 1982, Mr. Guidry pled guilty to embezzling $377,000 from the Union by depositing into his own account checks made payable to the union from several trust funds. The Union and Mr. Guidry stipulated to the entry of a $275,000 judgment in January 1986 on the Union's first five claims of relief. That judgment has been certified as final.

Mr. Guidry brought this suit after being denied early retirement pension benefits by the Sheet Metal Workers' National Pension Fund and the Sheet Metal Workers' Local Unions and Councils Pension Plan.[1] The defendant pension funds claimed they owed no benefits because plaintiff's misconduct forfeited his right to payment. Alternatively, the funds and the Union argued that plaintiff's pension benefits should be placed in a constructive trust until satisfaction of the stipulated judgment. The district court granted Mr. Guidry his pension funds but placed them in a constructive trust to be paid to the Union. In its order denying plaintiff's motion for a new trial, the court further held that the constructive trust was not limited to pension benefits actually traced to the embezzlement.

I.

Plaintiff first contends that the district court's decision to impose a constructive trust on his interest in the pension plan is contrary to the anti-alienation provision of ERISA. This provision mandates that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(1). The only express exceptions to this provision allow assignment for a "qualified domestic relations order" and "a voluntary and revocable assignment of not to exceed 10 percent of any benefit payment . . . . "29 U.S.C. § 1056(d)(2),(3). Plaintiff further points out two circuit courts have held that the meaning of § 1056(d)(1) is clear and have therefore refused to find an exception for criminal conduct. See Ellis Nat'l. Bank of Jacksonville v. Irving Trust, 786 F.2d 466 (2d Cir. 1986); United Metal Prods. v. National Bank of Detroit, 811 F.2d 297 (6th

Cir. 1987), cert. denied, 108 S. Ct. 1494 (1988).

However, the anti–alienation provision has not been regarded as immutable by the courts. In Stone v. Stone, 632 F.2d 740 (9th Cir. 1980), cert. denied, 453 U.S. 922 (1981), for example, the court required pension plan payments to be made directly to an ex–spouse to pay her community property share. A number of courts have also garnished pension plan benefits to satisfy alimony and child support obligations[2] E.g., American Tel. & Tel. v. Merry, 592 F.2d 118 (2d Cir. 1979); Senco of Florida v. Clark, 473 F. Supp. 902 (M.D. Fla. 1979). In all of these decisions, courts have used their inherent equitable authority to find implied exceptions to ERISA's anti–alienation provision when the beneficiary sought to avoid a legal duty.

Building upon these earlier decisions, the D.C. Circuit and the Eleventh Circuit have decided that. a court may garnish a beneficial interest in a plan to satisfy a judgment based on a breach of ERISA. In Crawford v. La Boucherie Bernard, Ltd., 815 F.2d 117 (D.C. Cir.), cert. denied, 108 S. Ct. 328 (1987), the court offset the interest of a participant and trustee in a profit sharing plan against a judgment based on his embezzlement of trust funds. The court emphasized the broad goal of ERISA to "protect . . . the interests of participants in employee benefit plans . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. S 1001(b). The court also noted ERISA provides that a person who breaches a fiduciary duty "shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, . . . and shall be subject to such other equitable or remedial relief as the court may deem appropriate . . . ." 29 U.S.C. § 1109(a). Pursuant to these statutes, , the court held that it had broad authority to fashion remedies, including offsetting defendant's plan benefits against a judgment debt, to redress breaches by trustees and to protect the interests of participants and beneficiaries. 815 F.2d at 119.

The court in *St. Paul Fire and Marine Ins. v. Cox*, 752 F.2d 550 (llth Cir. 1985), also held that a trustee–participant's interest in a

pension fund could be garnished to satisfy a judgment debt resulting from embezzlement of funds. The court found that ERISA's purpose of establishing standards to assure the equitable character of pension funds included protecting employees against mismanagement of these funds. "The insulation of an employee from liability for the consequences of his criminal misconduct does not protect the financial interests of other employees or promote security in the workplace," the court concluded. 752 F.2d at 552. "On the contrary, in such cases garnishment of the employee's fund interest best serves the financial stability of the employer and, indirectly, the employer's pension plan." *Id. See Also Calhoun v. FDIC*, 653 F. Supp. 1288, 1293 (N.D. Tex. 1987) (following *St. Paul Fire* in holding the FDIC's withholding of pension plan benefits to an insolvent bank did not violate ERISA's anti–alienation provision).

We agree with the D.C. and Eleventh Circuits and decline to follow the holdings of *Ellis Nat'l. Bank* and *United Metal Prods.*[3] A major purpose bf ERISA is to safeguard "the continued well–being and security of millions of employees and their dependents . . . [by establishing) minimum standards . . . assuring the equitable character of [pension fund] plans and their financial soundness." 29 U.S.C. § 1001(a). We find no indication in the Act that the unscrupulous fiduciary is to be protected from the natural legal consequences of his or her misdeeds. Indeed, as the D.C. Circuit noted, "A contrary interpretation would permit trustee wrongdoers to benefit from their misdeeds at the expense of those whom ERISA was designed to protect." Crawford, 815 F.2d at 121. When Mr. Guidry left office after embezzling at least $370,000, the Union had only $150,000 in cash assets remaining, and the financial security of workers who relied upon the Union's pension plan was severely undermined. Given the express purpose of ERISA to protect the financial security of employees, we find it extremely unlikely that Congress intended to ignore equitable principles by protecting individuals such as the plaintiff from the consequences of their misconduct.[4]

Furthermore, the district court's use of a constructive trust to redress breaches of ERISA was proper. The Supreme Court has consistently emphasized the inherent equitable jurisdiction of

federal district courts.[5] See *Cummings By Techmeier v. Briggs & Stratton Retirement Plan*, 797 F.2d 383, 390 (7th Cir.), cert. denied,

107 S. Ct. 648 (1986). For example, in *Mitchell v. Robert De Mario Jewelry*, 361 U.S. 288, 291 (1960), the Court stated that "[u]nless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction." Any statutory restriction of a court's jurisdiction in equity must be clearly stated or be accomplished by "a necessary and inescapable inference." Porter v. Warner Holding Co., 328 U.S. 395, 398. "The great principles of equity, serving complete justice, should not be yielded to light inference or doubtful construction." Id. (quoting Brown v. Swann, 34 U.S. (10 Pet.) 29 (1836)).

Far from limiting the inherent power of a district court, Congress emphasized on several occasions the broad scope of remedies available under ERISA. In addition to the previously mentioned statutory language giving the courts authority to fashion remedies, e.g., 29 U.S.C. § 1109(a), the legislative history of the Act indicates Congressional intent to provide a broad variety of remedies for redressing the interests of participants and beneficiaries when they have been adversely af fected by breaches of fiduciary duty. See Eaves v. Penn, 587 F.2d 453, 462 (10th Cir. 1978). For example, the Report of the Senate Committee on Labor and Public Welfare states: "The enforcement provisions have been designed specifically to provide both the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations. . . . The intent of the committee is to provide the full range of legal and equitable remedies available in both state and federal courts." S. Rep. No. 93–127, 93d Cong., 1st Sess., reprinted in 1974 U.S. Code Cong. & News 4838, 4871. In developing these remedies, Congress intended the federal courts to draw upon principles of traditional trust law:

> Neither existing State nor Federal law has been effective in preventing or correcting many . . . abuses [by fiduciaries). Accordingly, the legislation imposes strict fiduciary obligations on those who have discretion or responsibility respecting the management, handling, or disposition of pension or welfare

> plan assets. The objectives of these provisions are to make applicable the law of trusts; . . . to establish uniform fiduciary standards to prevent transactions which dissipate or endanger plan assets; and to provide effective remedies for breaches of trust.

Statement of the Honorable Harrison A. Williams, Jr., 120 Cong. Rec. S–15737, Aug. 22, 1974, reprinted in 1974 U.S. Code Cong. & Admin. News 5177, 5186.

Trust law contemplates the use of flexible remedies which will be most advantageous to the trust's participants and will be most conducive to effectuating the purposes of the trust. Eaves v. Penn, 587 F.2d at 462 (quoting Restatement (Second) ofTrusts § 214 (1959)). It is also an axiom of trust law that a trustee should not be permitted to benefit from his own breaches, Restatement (Second) of Trusts § 205 Comment I, and the constructive trust has long been recognized as a method for preventing the unjust enrichment of a trustee who has fraudulently divested a trust. E.g., Askins v. Easterling, 347 P.2d 126 (Colo. 1959); Unicure, Inc. v. Thurman, 599 P.2d 925 (Colo. App. 1979). We believe the district court's imposition of a constructive trust on plaintiff's pension benefits both accorded with these principles of trust law and was well within its discretionary power as defined by the common law and ERISA. We therefore affirm its employment of the constructive trust remedy.

II.

Plaintiff next argues that even if the use of the constructive trust is upheld, it can only be used to recover the specific property wrongfully taken. Therefore, plaintiff claims, the Union may only recover embezzled money which was deposited in the pension funds. The Union cannot make this showing because plaintiff dissipated the embezzled funds through gambling.. The Union cannot make this showing because plaintiff dissipated the embezzled funds through gambling.

This argument is not convincing. Plaintiff correctly states the standard rule that beneficiaries only have a personal claim against a trustee unless they are able to trace the trust property. However, if the trustee is also a beneficiary, it is a tenet of trust law that

other beneficiaries can compel repayment out of the trustee's beneficial interest of any losses to the trust resulting from breach of duty. This rule applies even if the beneficiaries cannot trace the stolen trust property. III A.W. Scott, *Scott on Trusts* § 202 (3d ed. 1967). As Professor Scott explains:

> If the trustee is also one of the beneficiaries . . . the other beneficiaries can compel him to make good the breach of trust out of his beneficial interest in the trust property. The defaulting trustee–beneficiary is not entitled to receive his share of the trust property until he has made good the loss which resulted from his breach of trust. . . . Thus if T is trustee under a trust to divide the income among two other beneficiaries and himself for life, and he commits a breach of trust resulting in a diminution of the income, the other beneficiaries are entitled to insist that the loss of income shall be made good out of his interest.... The truth is that the impounding of the share of the trustee–beneficiary is a method of compelling him to make specific restitution for the breach of trust in a situation where it is possible thus to compel specific restitution.

Id. § 257. See also G.G. Bogert & G.T. Bogert, The Law of Trusts and Trustees § 191 (2d ed. 1979) ("[i]f a beneficiary is also a trustee of his own trust . . . and . . . if he steals trust funds, or causes damage to the trust estate in other ways, his share under the trust, whether in his own hands or those of a transferee, will be taken by the court in order to make good the loss").

The few relevant cases uniformly follow the rule articulated in these treatises. For example, in In re Van Nostrand's Will, 29 N.Y.S.2d 857 (Sur. Ct. 1941), the court placed an equitable lien upon the beneficial interest of a trustee who had embezzled trust property to compensate wronged beneficiaries of the trust. The trustee–beneficiary was treated as having received his interest by anticipation: he could not enjoy his beneficial interest because he had already embezzled his share of the trust. 29 N.Y.S.2d at 865. See also In re Watson, 449 N.E.2d 1156 (Ind. Ct. App. 1983)

(successor trustee properly applied former trustee's undistributed income to satisfy prior judgment for embezzling trust corpus); In re Brereton's Estate, 130 A.2d 453 (Pa. 1957) (beneficiaries may impound share of trustee–beneficiary who advanced himself sums from the trust).

The fact that the anti–alienation provision of ERISA might be interpreted as a spendthrift clause does not preclude the use of a constructive trust to garnish plaintiff's pension benefits. While the interest of a trustee–beneficiary of a spendthrift trust cannot be reached by his creditors, other beneficiaries can still impound the interest to satisfy losses resulting from a breach of trust unless the settlor of the trust specifies otherwise. See, e.g., Restatement (*Second of Trusts* § 257 comment f; III *Scott on Trusts* § 257.1. In In re Burr, 257 N.Y.S. 654 (Sur. Ct. 1932), aff'd, 263 N.Y.S. 945 (N.Y. App. Div. 1933), for example, the court held that a trustee properly withheld trust payments owed to a prior trustee who had misappropriated trust funds. In reaching this conclusion, the court disregarded a state statute precluding the assignment of a beneficiary's interest because "(i)t was not intended to protect a dishonest fiduciary in the retention of income otherwise payable to him from the trust." 257 N.Y.S. at 657.[8]

Congress did not intend for ERISA's anti–alienation provision to protect dishonest fiduciaries. Simply, there is no indication in ERISA's statutory language or legislative history that an unscrupulous trustee should be shielded from the consequences of his misdeeds. On the contrary, there are repeated references to the goal of promoting stability in the work place by protecting the beneficiaries from potential misdeeds, negligence, and mismanagement by fiduciaries of benefit plans. E.g 29 U.S.C. § 1001(b). Given this professed purpose of ERISA, we do not think anti–alienation provision to preclude impoindment of the beneficial interest of a trustee who has damaged a trust through embezzlement. We therefore hold that the district coourt properly imposed a constructive trust upon plaintiff's pension benefits, regardless of whether the embezzled funds could be traced back into the trust.

III.

Plaintiff's final argument is that he may exempt seventy-five percent of his pension benefits from garnishment under the provisions of the Consumer Credit Protection Act. According to this legislation, only a maximum of twenty-five percent of an individual's weekly earnings may be garnished. 15 U.S.C. § 1673(a). "Earnings" are defined as "compensation paid or payable for personal services, whether denominated as wages [or] salary . . . and includes periodic payments pursuant to a pension or retirement program." 15 U.S.C. § 1672(a); see also Ward v. Ward, 396 A.2d 365 (N.J. Sup. Ct. 1978) (pension benefits are "earnings" under the Consumer Credit Protection Act). Furthermore, "garnishment" is defined as "any legal or equitable procedure through which the earnings of an individual are required to be withheld for payment of any debt," 15 U.S.C. 1672(c), and could encompass the constructive trust levied in the instant case.

However, plaintiff appears to have not complied with the procedural requirements of Colorado's garnishment laws.[7] According to the Colorado Rules of Civil Procedure, after the garnishee delivers a copy of the judgment creditor's writ of continuing garnishment with a statement of exempt and nonexempt earnings, the judgment debtor has five days to resolve any dispute regarding these calculations. C.R.C.P. 103, § 6(a)(1) (1987 Supp.). If the judgment debtor's objection is not resolved within this period, he has five more days to file a written objection with the court. C.R.C.P. 103, § 6(a)(2). Alternatively, the judgment debtor who fails to file a written objection may within six months of receiving the writ of garnishment object to the court if new evidence indicates that error occurred. C.R.C.P. 103, § 6(d)(1),(2). From the record provided by plaintiff, it is apparent he did not make any objection within the specified time period.

We are mindful that the garnishment proceedings in the instant case were unusual, since the three defendant pension funds argued throughout the proceedings that plaintiff had forfeited his pension benefits by his fraudulent conduct and therefore the Union could not garnish any money in the funds.

Nevertheless, Colorado places the burden of objecting to a writ of garnishment firmly upon the judgment debtor; the failure of the judgment debtor to file a timely objection results in the automatic disbursement of the garnished money to the judgment creditor. C.R.C.P. 103, S l(L)(1). Plaintiff in the instant case received a copy of the writ of garnishment which both gave the calculation of the nonexempt money owed to the Union and enumerated his right to object to the garnishment. Plaintiff should have then responded to the Union's writ seeking all his pension benefits by bringing the exemption restriction of the Consumer Credit Protection Act to the court's attention. Having failed to do so, we believe plaintiff may not now raise this issue several years after the writs of garnishment were issued. The issue of the exemption was not properly before the district court; therefore, we refuse to consider it. Accordingly, we affirm the district court's judgment imposing a constructive trust upon all of plaintiff's pension benefits until the judgment debt is satisfied.

AFFIRMED.

FOOTNOTES:

[1]The Union successfully moved to intervene in the suit and joined the Local No. 9 Pension Fund.

[2]This family support exception was later codified by Congress in its amended ERISA statute, 29 U.S.C. S 1056(d)(3).

[3]The courts in these two decisions rely upon identical arguments distinguishing between the accepted family support exception and the fraud exception. See United Metal Prods., 811 F.2d at 299300; Ellis Nat'l. Bank, 786 F.2d at 470-471. We do not think these arguments are persuasive. First, both courts argue that only the family support exception rests on the express fundamental purpose of ERISA to provide income to workers and their families. The courts overlook, however, the Act's expressed purpose of protecting employees from mismanagement of their pension funds. This purpose would not be advanced by letting fiduciaries who have acted fraudulently enjoy pensions from funds damaged by their misconduct. Second, both courts point out that the Labor and Treasury Departments have urged the adoption of the family support exception but have remained silent on the fraud exception. We agree that recommendations by these agencies should be given some weight. But their interpretation is not controlling. E.g., Skidmore v. Swift & Co., 323 U.S. 134 (1944). The fact that neither agency has recommended

the fraud exception does not persuade us to ignore the strong arguments supporting such an exception. Third, the two courts recognize "abundant case law" supporting the family support exception and very few cases accepting the fraud exception. While the family support exception was broadly accepted even before it became codified, three circuit courts have implied a fraud exception to the anti-alienation provision of ERISA and only two have refused to allow the exception. Fourth, both courts express worry regarding the scope of the fraud exception, which they opined would likely be resolved only after extensive litigation. However, we believe a narrow exception applicable only to a trustee-beneficiary who has directly or indirectly damaged the fund through his fraudulent actions could be relatively easily defined and applied. Finally, both courts emphasize that the family support exception involves family relations, which are traditionally within the realm of state police power. But we believe the public interest in seeing that theft victims recover their stolen property is no less fundamental and firmly embedded within the realm of state police power.

[4]We are aware of the recent decision of Mackey v. Lanier Collections Agency & Serv., 108 S. Ct. 2182 (1988), in which the Supreme Court stated in dicta that ERISA's anti-alienation provision precludes garnishment of pension benefits. The Court's discussion ' however, focused on its holding that Congress did not intend to preempt state-law garnishment procedures of an ERISA welfare benefit plan (emphasis added). It neither discussed in depth nor cited support for its statement regarding pension benefit plans. We therefore do not believe this decision is dispositive of the issues in the instant case.

[5]Here, we contrast equitable jurisdiction with jurisdiction in law which we previously held is restricted to the specifics created by statute. Wyeth Laboratories v. United States Dist. Court for Dist. of Kan., 851 F.2d 321 (10th Cir. 1988).

[6]While the court in another leading case, Blakemore v. Jones 2 N.E.2d 112 (Mass. 1939), apparently reached an opposite conclusion, it probably did so by interpreting the testator's intent as prohibiting the impoundment of the trustee-beneficiary's interest. In Blakemore, the testator created a trust for his widow. After the named trustees disclaimed the responsibility, the court appointed the widow and her attorney as co-trustees. Through lack of good judgment by her co-trustee, the trust lost some of its principal, and a surety sought to reach her interest in the trust. The court held that the widow's interest could not be reached because the testator had created a spendthrift trust.

Although the court did not discuss the testator's intent, it is noteworthy that he did not appoint his wife trustee.

Furthermore, the widow did not act dishonestly or otherwise try to defraud the fund. As one commentator stated:

> The familiar rationale of spendthrift trusts is that the settlor's intent should be given effect if it does not violate public policy. . . . Such a violation does not seem to have occurred in the [Blakemore] case, since a trustee may by special provision be relieved from any liability for losses negligently incurred. . . . Although the [Blakemore] court did not stress [the widow's lack of moral fault, it seems clear that the present case should not control where the breach of trust is dishonest. A spendthrift clause hardly manifests an intention to protect the trustee beneficiary where he is dishonest, and even if such an intention could be found policy should forbid its fulfillment.

Recent Cases, 53 Harv. L. Rev. 129, 148 (1939) (citations omitted).

[7]In federal State garnishment laws are applicable to proceedings courts. Fed. R. Civ. P. 64. Also, we note that Colorado's garnishment laws are not preempted by ERISA. Although the preemption clause in ERISA broadly provides that the Act "shall supersede any and all state laws insofar as they . . . relate . .. to any employee benefit plan," 29 U.S.C. §1144(a), a great number of courts considering pension benefits have refused to hold that state garnishment laws are preempted by this provision. E.g., r American Tel. & Tel. v. Merry, 592 F.2d at 118; Operating Ei Local No. 428Y- ension Trust Fund v. Zamborsky 650 F.2d 196, 199 (9th C r. 1981). Preemption of state law is not favored unless Congress has unmistakenly so ordained or the nature of the regulated subject matter permits no other conclusion. Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 522 (1981). For the reasons given in this opinion, we do not believe Congress intended the preemption provision to preclude beneficiaries from garnishing a trustee's beneficial interest to rectify damage done to the trust as a result of his misconduct. Furthermore, as the Supreme Court recently pointed out, ERISA does not provide a mechanism for collecting judgments won against an ERISA plan.. Consequently, state lw methods for collecting money judgments must generally remain undisturbed by ERISA or there would be no way to enforce a judgment. Mackey v. Lanier collecting Agency & Serv., 108 S. Ct. at 2187.

APPENDICES

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT

Civil Action No. 84-M-879

CURTIS GUIDRY,

Plaintiff,

v.

NATIONAL SHEET METAL WORKERS' NATIONAL PENSION FUND, et al.,

Defendants

and

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL NO. 9,

Intervenor,

and

SHEET METAL WORKERS' LOCAL NO. 9 PENSION FUND,

Party Under F. R. Civ. P. 19

MEMORANDUM OPINION AND ORDER

This matter is before the court on cross motions for summary judgment filed by the plaintiff and the defendants, and the intervenor's motion for summary judgment on its sixth claim for relief. Oral argument was held on July 17, 1986.

The plaintiff, Curtis Guidry, was the chief executive officer of the intervenor Sheet Metal Workers' International Association, Local No. 9 ("the Union") from 1964 to September, 1981. He was also a trustee of the Sheet Metal Workers' Local No. 9 Pension Fund from 1977 to 1981. In 1982, he pleaded guilty to a violation of *29 U.S.C. § 501 (c)* for embezzlement of $377, 301.53 from the Union, and he served a prison term for that crime. Mr. Guidry admitted to stealing money from 1977 to 1981 by depositing to his own accounts checks made payable to the Union from two trust funds, purportedly to compensate the Union for administrative services rendered to the trust funds. The money embezzled has not been recovered. The Union and Mr. Guidry stipulated to the entry of a $275,000 judgment on January 14, 1986 on the Union's first five claims for relief against Mr. Guidry.

Mr. Guidry applied for and was denied early retirement benefits by the Sheet Metal Workers' National Pension Fund and the Sheet Metal Workers' Local Unions and Councils Pension Plan in December, 1982. He brought this action to recover accrued pension benefits from September 30, 1981 to date, and specific performance of the two pension contracts. Alternatively, he seeks recovery for breach of contract and for negligence. Mr. Guidry also applied for early retirement benefits to the Sheet Metal Workers' Local No. 9 Pension Fund, joined as a defendant party pursuant to Fed. R. Civ. P. 19(a)(1) by the Union, and he began receiving benefits in July, 1985.

The defendant pension funds initially asserted in their motion for summary judgment that they owe no benefits to Mr. Guidry because he was never a "participant" or a "covered person" eligible for pension benefits because of his misconduct. Although not conceding this argument, they now have adopted a fallback position that if pension benefits are owed, the Union is entitled to them as the victim of the beneficiary's embezzlement. The Union asserts it is entitled to summary judgment on its claim that in equity this court should impose a constructive trust on all pension benefits owed to Mr. Guidry until the $275,000 judgment plus interest is paid. Mr. Guidry claims that provisions of the Employee Retirement Income Security Act ("ERISA") prevent

both forfeiture and and a constructive trust, and that he is entitled to his undiminished pension as a matter of law.

ERISA sets forth nonforfeitability requirements in 29 U.S.C. § 1053(a), which provides that "[e]ach pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable" if the employee meets certain age and years of service requirements found in that section. As interpreted by several courts, that provision precludes forfeiture of pension benefits because of the employee's misconduct. *See Fremont v. McGraw–Edison Co.*, 606 F. 2d 752 (7th Cir. 1979), *cert. denied*, 445 U.S. 951 (1980); *Winer v. Edison Brothers Stores Pension Plan*, 593 F.2d 307 (8th Cir. 1979). Even in circumstances in which an employee defrauded his company and pleaded guilty to crimes related to his fraudulent schemes, ERISA has been held to bar forfeiture of vested pension benefits. *Vink v. SHV North America Holding Corp.*, 549 F. Supp. 268, 273 (S.D.N.Y. 1982). The court found that ERISA protected all employees from a fraud exception to the nonforfeitability provision.

The defendants' assertion that Mr. Guidry never was eligible for benefits because of his misconduct is contrary to section 1053(a) and precedent. Forfeiture is precluded even in these circumstances, and Mr. Guidry is entitled to his vested pension benefits as a matter of law.

Although it is clear that Mr. Guidry has a right to pension benefits, the question remains whether this court may impose a constructive trust in favor of the Union. The plaintiff argues that just as Congress has barred forfeiture, it has proscribed assignment or alienation of plan benefits in 29 U.S.C. § 1056(d)(1), which states "Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated." Although the language of section 1056(d)(1) is unconditional, Congress has recently enacted an exception to that provision pursuant to a "qualified domestic relations order" for family support after courts had found an implied exception. *See, e.g., American Telephone & Telegraph Co. v. Merry*, 592 F.2d 118 (2d Cir. 1979). *Merry* held that ERISA's preemption clause, 29 U.S.C.

§ 1144, did not alter traditional support obligations. The plaintiff argues that Congress provided one exception only, and that to imply another exception for fraud would be contrary to the clear intent of Congress.

Two circuits have reached contrary conclusions on this issue. In *Ellis National Bank of Jacksonville v. Irving Trust Co.*, 786 F.2d 466 (2d. Cir. 1986), the court refused to create a criminal misconduct exception to section 1056(d)(1) and ERISA's preemption clause. The court distinguished such a case from the family support exception which clearly furthered Congress' key objective in enacting ERISA to protect workers and their dependents. In contrast, the court in *St. Paul Fire and Marine Insurance Co. v. Cox*, 752 F.2d 550 (11th Cir. 1985) held that the nonalienability provision of ERISA did not preclude application of the equitable principle that a wrongdoer should not profit from his own misdeeds. The court permitted garnishment of the pension payments. Neither case is controlling.

None of the cases cited presented the unique circumstances of the case before this court involving a labor union, pension plans for its members and a former employee who used his position of trust with the union and pension plans to embezzle funds. The question is not whether particular state law is preempted by ERISA, but how to interpret the nonalienability provision's effect on other federal statutes. While it is essential to interpret ERISA in light of Congress' intention to protect employees and their families from loss of vested rights, ERISA must be read in pari materia with important federal labor legislation. Congress enacted the Taft-Hartley Act—the Labor Management Relations Act of 1947—in part "to protect the rights of individual employees in their relations with labor organizations." 29 U.S.C. § 141(b). When it became apparent that certain union officers abused the power they acquired, Congress regulated the internal affairs of labor organizations by its passage of the Landrum-Griffin Act—the Labor Management Reporting and Disclosure Act of 1959. Stated purposes of the act were to eliminate corrupt practices on the part of union officers and to protect the rights and interests of workers. *See* 29 U.S.C. § 401.

Congressional intent becomes clearer when the purposes of all three statutes are examined as a whole. Congress intended to protect employees form improper practices of employers and of the employees' own elected union officials. In circumstances where the viability of a union and the members' pension plans was damaged by the knavery of a union official, a narrow exception to ERISA's anti-alienation provision is appropriate. Benefits payable to Curtis Guidry will be held in constructive trust until the entire judgment entered against him by the Union is satisfied.

ORDERED that the plaintiff Curtis Guidry is entitled to vested pension benefits and his motion for summary judgment is granted; and the clerk will enter judgment for Curtis Guidry and against the Sheet Metal Workers' National Pension Fund, the Sheet Metal Workers' Local Unions and Councils Pension Plan, and their trustees, and against the Sheet Metal Workers' Local No. 9 Pension Plan; and it is

FURTHER ORDERED that the intervenor's motion for summary judgment on its sixth claim for relief is granted, and the clerk shall enter judgment for the Sheet Metal Workers' International Association, Local No. 9 and against Curtis Guidry, the Sheet Metal Workers' National Pension Fund, the Sheet Metal Workers' Local Unions and Councils Pension Plans, the Sheet Metal Workers' Local Unions and Councils Pension Plans, and the Sheet Metal Workers' Local No. 9 Pension Plan; and it is

FURTHER ORDERED that all pension benefits accrued to the date of judgment and owed to Curtis Guidry from the three pension funds are immediately payable to the Sheet Metal Workers' International Association, Local No. 9; and a constructive trust is imposed upon future payments of pension benefits owed to Curtis Guidry such that those benefits shall be paid directly to the Union until the $275,000 judgment plus interest entered January 14, 1986 has been satisfied.

Dated: *July 23, 1986*

BY THE COURT:
/S/ Richard P. Matsch, Judge

APPENDICES

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 84–m–879

CURTIS GUIDRY,

Plaintiff,

vs.

NATIONAL SHEET METAL WORKERS' NATIONAL PENSION FUND, et al.,

Defendants,

and

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL NO. 9,

Intervenor,

and

SHEET METAL WORKERS' LOCAL NO. 9 PENSION FUND,

Party Under F.R. Civ. P. 19.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Proceedings held before the Honorable Richard P. Matsch, U.S. District Judge, for the District of Colorado, on the 17th day of July, 1986, at the hour of 10:30 o'clock a.m. in Courtroom A, United States Post Office Building, Denver, Colorado.

APPEARANCES:

GUERRIERI & SWEENEY, P.C.

By:

RAYMOND J. SWEENEY, Esq.

Suite 300, 1150 Seventeenth Street, N.C.

Washington, D.C. 20036

For the Defendants.

ELROD, KATZ, PREEO & LOOK
By:
MICHAEL P. SERRUTO, Esq.,
and
ROBERT E. PENNINGTON, Esq.
Suite 100, 1120 Lincoln Street
Denver, Colorado 80203

For the Plaintiff.

BRAUER & BUESCHER, P.C.
By:
JOSEPH M. GOLDHAMMER, Esq.
1563 Gaylord Street
Denver, Colorado 80206

For the Intervenor.

COURT REPORTER: Janica Martynow
P. 0. Box 8775 893-0284
Denver, Colorado 80201

Proceedings recorded by mechanical stenography, transcript produced by notereading.

(Call to order of Court at 10:30 o'clock a.m.)

THE COURT: Be seated please. This is Civil No. 84-M-879, Curtis Guidry against Sheet Metal National Pension Fund and others, with Sheet metal Workers international Association Local 9 as intervenor.

We are here to consider several matters; the Plaintiff's motion for summary judgment filed June 6, 1985; the Defendants' motion of July 16, 1985; the intervenor's motion for s[illegible]ary judgment on the sixth claim for relief filed March 23rd, 1986. There is also a traverse to answers to writs of garnishment.

I reviewed the briefing that has been submitted in this matter, and as I understand the issues there are two basic issues; one is whether the prohibition against forfeiture, the statutory prohibition against forfeiture in ERISA prevents the pension fund's assertions of non-qualification and defenses to the Plaintiff's claim for entitlement, and then whether the intervenor, assuming the Plaintiff prevails on that, is entitled to the monthly payments and the accrued payments; whether the intervenor

can get at it to collect its judgment, that was the consent judgment, stipulated judgment entered in this case, under an equitable doctrine, whether it be called constructive trust or equitable garnishment or whatever.

It seems to me, therefore, the order in which we should proceed is the Plaintiff's motion, and we will call on Plaintiff's counsel accordingly.

MR. SERRUTO: Thank you, Your Honor. Plaintiff's position before this Court, Your Honor, is that neither Section 1053 of the Act, which prohibits forfeiture, nor 1056, which prohibits attachment, permits the funds to withhold Mr. Guidry's pensions.

It is undisputed that but for the limited non-qualification issue raised by the Defendants' funds, and Mr. Guidry would have otherwise been entitled to as pension benefits.

The one issue is that by reason of Mr. Guidry's dishonest conduct he was not a qualified participant. That implied within the time constraints the time requirements for services, the implied requirement of faithful service and honest conduct, Section 1053, Your Honor, expressly prohibits non-qualification, disqualification of an otherwise qualified participant on this basis.

The plans do not provide expressly for disqualification for dishonest conduct, and Plaintiff argues the reason for that is the so-called bad boy clauses have been held to be unenforcible.

So the funds' defense is it is an implied requirement of the plans. This implied — such a disqualification is not permissible under the case law, as fell, and. the express intent of Congress.

The cases heavily rely upon the legislative history of Section 1053 of the Act. Perhaps the lead case here, though I do not recall that it has been so described, the *Vink* case, *Vink vs. SHV Corporation*, the case is a forfeiture case for the reason that the employer withheld the benefits, and a Mr. Vink appearing pro se prevailed at the trial of them. There was no appeal. The Court found that if ever there was a case for a criminal misconduct exception to be

carved from the Act, that would be the case.

It is similar to the case before this Court, Your Honor, in tbat the thefts occurred over a long period of time. An employer, just as the funds have here argued, that it is duration together with the potential financial instability wreaked upon the plans by the dishonest conduct merited the exception. The Court refused to create this exception.

Notably this case occurred subsequent to the *AT&T vs. Merry* case, which is acknowledged as the lead case in creating an implied exception to the ERISA preemption provisions.

Merry was distinguished by the Court in *Vink*, and subsequently by the Second Circuit in the *Ellis* case.

THE COURT: Do you know whatever finally happened in the *Vink* case? They apparently allowed counterclaims to go forward.

MR. SERRUTO: The only note I remember from the case, Your Honor, is Mr. Vink was ordered to file his response and hadn't at that time. I never saw a reported decision after that.

THE COURT: I am sure there is nothing reported. I just had a curiosity about what ultimately happened to Mr. Vink.

MR. SERRUTO: Well, we know he got his pension, Your Honor.

THE COURT: Well, we don't know they aren't offset by counterclaims for disgorgement, and that's beside the point, and this argument was just a matter of curiosity with me.

MR. SERRUTO: Plaintiff has cited additional cases in addition to the *Vink* case, however, the *Vink* case I think most accurately fits the facts of this case, and its result is that the Court held the funds may impose forfeiture upon the dishonest conduct.

Assuming that pension benefits are non-forfeitable, I would address the second point, Your Honor, raised by you in your introductory comments, and that has two aspects; should the inherent equitable powers of this Court be exercised either in favor of the funds, but perhaps more

appropriately in favor of the union to divert pension benefits from the funds, from the participants to the union?

The Plaintiff's position is this Court does indeed have inherent equitable powers, as in the *Ramos* case, to further constitutional prerogatives.

As in this case, in the case before this Court, the *Keyes* case, to further the expressed Congressional intent of the statute and, further, I would argue as well, to further apparrent or implied Congressional intent if there is no expressed Congressional intent.

That factor is not before this Court, Your Honor, for the reason that Congress has expressly spoken upon this issue both in its statutes and in its legislative history.

The position urged by the judgment creditor in this case would not further any expressed Congressional policy, but would rather thwart an expressed Congressional policy, and thwart the act as well.

Section 1056 expressly forbids alienation or attachment.

THE COURT: That's an argument, I understand, if you limit the Congressional policy statements to those which are contained in ERISA, but the intervenor's claim also does involve other policies relating to the national labor laws, don't they?

MR. SERRUTO: If I understand their arguments correctly, Your Honor, regarding the viability of the plans —

THE COURT: No. I am not talking about ERISA. I am talking about, there is a stipulated judgment of $275,000 I think is the number, that's based on the first five claims for relief of the intervenor, right?

MR. SERRUTO: Yes, Your Honor.

THE COURT: Those five claims for relief involved Mr. Guidry's obligations to the union.

MR. SERRUTO: Yes, Your Honor.

THE COURT: which involves national labor policy, doesn't it? I mean, this isn't just a judgment creditor. If this were Aetna Finance, just to take somebody, and we were talking about a consumer obligation or something of that nature, but shouldn't we, in looking to Congressional policy,

and in considering equitable powers of this Court, go beyond simply ERISA itself, and talk about this matter? I think in pari materi is the thing they haul out now and then when they say, look to other statutes that relate to the subject matter, and don't we look to the national labor policy as reflected in the other statutes dealing with the relationship between unions and officers?

MR. SERRUTO: Your Honor, I would — every victim is going to be able to point to some statutory enactment, be it a criminal statute, and in this case, a criminal statute was a plea of guilty was entered into for breach of fiduciary duty, but every victim will be able to point to such statutes.

Your Honor, ERISA, the Congress sought to limit without exception the alienation of benefits; that is — perhaps I can express myself more clearly in the context of preemption, since ERISA sought to preempt state law, the construing of, these state concerns, and in Mr. Guidry's case it was a federal statute that was involved, but the funds — pardon me, the unions have sought to assert common law equitable principles as well as principles of trust as well. So those doctrines are urged additionally.

ERISA, there is a preemption provision that would interdict the operation of those statutes, and interdict their policy concerns, and segregate them.

So further, it is fundamental purposes, and so if reference is helpful to these other — to, in this case, the body of labor law, Plaintiff argues and contends that ERISA preempts those doctrines, as well as the common law doctrines asserted by the union.

In think in this context the exercise of inherent equitable powers, and the urging of an implied equitable exception to the Act, for me, are most clearly seen in the context of preemption; that the *Ellis* case expressly considered trust doctrine, the doctrine of restitution, and purported, although I don't believe *Ellis* ever accepted this doctrine, estate concern, estate interest that victims be compensated for their loss by the tortfeasor. *Ellis* found that ERISA preempted those doctrines.

So in the exercise of this Court's inherited equitable powers, those powers, to fashion a relief, would be limited by the scope of the Act, by the expressed legislative intent.

In fact, in urging the equitable exception following from the *AT&T vs. Merry* case, Congress amended the preemotion provisions of the Act expressly to make it clear that this was a limited exception to the preemption provisions and that the exception would further be necessary to ensure that only those orders that are exempted from the spendthrift provisions are not preempted by the Act.

The *Merry* case recognized an implied exception to the ERISA preemption provision for qualified — what are now referred to as qualified domestic relations orders. It was not an equitable case. It was a preemption case.

The *Ellis* case implied — imposed a four point test to determine whether the state concerns, the state policies, the state interests asserted by the judgment creditor in *Ellis* were preempted; found they were not.

Finally, Your Honor, in response to your concern that we don't have Aetna Finance here, for instance, that we do have the victim, Plaintiff's legal position is the Courts will be confronted by victims in a bottomless stream of litigation should a criminal misconduct exception be carved out of the Act; that although the union has argued that the Court sitting in equity certainly has a case by case function to perform, and that function is appropriate, it is not appropriate here because Congress expressly limited, eliminated the court sitting in a case by case basis on how much misconduct would be appropriate to forfeit someone's benefits.

Mr. Guidry and his embezzlements sit perhaps way at the end of the spectrum of that kind of misconduct perceived, acknowledged by Congress to be protected. Congress intended to protect even the worst thief, if Mr. Guidry is the worst thief, in order to protect other kinds of criminal misconduct of lesser degree, of different types.

Before the Act was passed, I believe in the case law discussed forfeiture of pension benefits for things such as violations of non-competition agreements, thefts and embezzlements, acquisition of customers, taking customers from the employer. Congress didn't refuse to allow case by case determinations of how much misconduct, what kind of misconduct was going to lead to the alienation of these benefits, and stated all misconduct is going — misconduct is not going to be a factor, an element for eliminating pension benefits, and although, Mr. Guidry, just like Mr. Vink, seeks the protection of the law. He is entitled to the protection of the law. I have nothing further, Your Honor.

THE COURT: All right, thank you. We will hear from the pension plan Defendants. Mr. Sweeney.

MR. SWEENEY: Your Honor, I am here this morning'as counsel representing the two original Defendants, Sheet Metal Workers' National Pension Fund and Sheet Metal Workers' Local unions and Council's Pension Fund, Sheet Metal Workers' Local 9 Pension Fund, the local plan.

THE COURT: Yes. He has three different plan entitlements that are at issue.

MR. SWEENEY: That's correct, Your Honor.

THE COURT: Okay.

MR. SWEENEY: Your-Honor, this is not a complex case. Quite the contrary, I think it is a very simple case. The original Defendants and the Rule 19 Defendants are simply asking the Court to exercise its inherent, I emphasize that word, inherent equitable powers to prevent an injustice from occurring today.

This is a unique case, Your Honor, in that there are no factual disputes, and quite frankly I question whether there is even any legal disputes.

The facts are clear. Mr. Guidry held a position of trust for over 20 years. He was a local union official. He was a trustee of the local health welfare plans and pension plan. He misused that position of trust. He embezzled approximately $1 million.

That embezzlement would be going on today, Your

Honor, but for a spot check by the Department of Labor in 1981. Due to that spot check, Your Honor, Mr. Guidry was found guilty and imprisoned for five years in the Federal Penitentiary,

The victim of the crime, Your Honor, however, Local 9 has not received any compensation, or any form of restitution and, but for the pension assets in question before this Court today, Local 9 will not receive any compensation.

Your Honor, as you noted at the outset of the essentially has an arguments this morning, the pension plan alternative argument. The argument is one of entitlement. He is not entitled to a pension. I won't go into the details of that argument, Your Honor.

Quite frankly, Your Honor, the pension plans argued in the alternative for the following reasons. The entitlement argument is posed essentially to set before the Court the dilemma which the trustees, themselves, found themselves in when Mr. Guidry filed for his pension application. The trustees, as the Court well knows, had their own fiduciary obligations to interpret the plan in a fair and impartial manner; to interpret the plan in a way that no one could say is either arbitrary or capricious.

When the trustees of the plans was faced with the dilemma, Your Honor, they found themselves with what they believe Congressional intent behind ERISA and governing equitable principles.

The Congressional intent have been discussed at length in the papers before the Court. I think I can summarize in two words, Your Honor, the Congressional intent in the eyes of the Defendant trustees was quite simply, one, Congress sought to preserve the private pension plan system and, two, Congress sought to protect the sanctity of the workplace.

The trustees of the two of the three Defendant plans found themselves in this dilemma then, Your Honor. They found themselves with a Mr. Guidry who used his 20 years as a trustee, and as a union official, to attack the very purpose of ERISA; specifically, he used his position to

embezzle funds from the local plan jeopardizing the local plan. He used his position to virtually bankrupt the local union.

THE COURT: Let me interrupt a moment, because you said from the local plan. Now, my understanding is that the embezzlement was from the union, and that in part it was from payments which the plans made to the union, for the union's administrative services and expenses on behalf of the plans.

MR. SWEENEY: That's an ongoing and legal question, Your Honor, as to when that check became an asset of the local union, or did it retain its identity as an asset of the local plan before it was embezzled by Mr. Guidry? I wasn't involved in that litigation.

THE COURT: But it is not contended, is it, that the payments which were going to the union, the local, were inappropriate?

MR. SWEENEY: The payments themselves, no.

THE COURT: Yes. In other words, he wasn't using the union to skim the plans?

MR. SWEENEY: I think there was evidence, Your Honor, that there was — let's say for example, give a hypothetical, the administrative for tbe month of September was for $1,000. He would have them administer two checks for $2,000, neither finding its way into the local union bank. So in effect, he was using pension plan assets inappropriately.

THE COURT: But the victim here in terms of whose money got taken is the union.

MR. SWEENEY: Ultimately the union. The thrust of my argument, Your Honor, was if Mr. Guidry's embezzlement had not been discovered and been prosecuted he would have, in fact, bankrupt the only contributing employer to the local union's plans.

So, in effect, we have an individual before the Court today saying that ERISA protects me in my guest for these pension benefits, whereas —

THE COURT: To put the thing in legal context so

that I understand, my understanding here is that different from the *Vink* case, you don't have counterclaims?

MR. SWEENEY: That's correct, Your Honor.

THE COURT: You don't have a basis for recovering back from Guidry?

MR. SWEENEY: No, Your Honor.

THE COURT: Okay.

MR. SWEENEY: To oversimplify my argument, we are standing before the Court today on what I call the primary position we have; we are holding a pool of assets. We believe that the Court has inherent equitable powers to direct the three pension plans to establish a constructive trust. Into that constructive trust we will deposit the present value of Mr. Guidry's pension. Now we have that corpus of money, Your Honor.

I would submit that corpus of money should be used first to compensate the victim of Mr. Guidry's crimes, Local 9. If there is anything remaining, Your Honor, if the Court deems it appropriate, it would be paid to Mr. Guidry.

But I think it is quite absurd, Your Honor, for Plaintiff's counsel to contend to this Court that the Court does not have the equitable power to prevent the gross injustice that would occur today if the pension plans were directed to pay Mr. Guidry the benefit.

If that occurred, Your Honor, the victim of his crime in Local 9 would never see one penny of the amounts embezzled. Thank you, Your Honor.

THE COURT: All right. Mr. Goldhammer.

MR. GOLDHAMMER Thank you, Your Honor I am here representing the intervenor, and I think the Court has earlier hit upon what I was going to talk about in my argument today, and that is the notion, and it seems amazingly simple after reading over my brief again, I covered it in the last two paragraphs of the brief, I emphasize the difference between this case and every other case that precedes it.

Every case that was cited in the briefs, with the exception in the two cases I cite at the very end of my brief is this case involves a union pension plan, and a union, and there are long-standing federal policies against corruption

in labor unions, and that goes back to Taft-Hartley, which was passed in 1947, 29 United States Code Section 186, which is the statute authorizing the existence of the Defendant pension plans.

The purpose of that statute was to prevent corrupt payments being made between labor unions and management, payoffs, and so what they did in that statute is they set up pension plans and benefit plans for the purpose of joint labor management trust funds with joint labor management participation, and the Congress thought that would stem the tide of these corrupt payments, and would make the benefit plans clean, and the unions clean for purposes of benefiting the worker.

All of the legislation we are talking about here has a common theme, Your Honor, Taft-Hartley, Landrum Griffin, which is the next statute I will talk about, and ERISA are pro-worker legislation. They want to protect the worker from corruption. They want to protect the worker to get his pensions, and that theme would not be served by giving Curt Guidry his pension.

The court is concerned about whether it would have the power to somehow interdict the pension to Mr. Guidry, and the Court does have the power to construe Taft-Hartley in conjunction with ERISA. It also has the power to construe Landrum-Griffin with ERISA.

The jurisictional basis for the intervenor's claim is Landrum-Griffin, 29 United States Code section 501. This contains both criminal and civil penalties for embezzlement and corruption in labor unions.

Mr. Guidry, the Plaintiff in this case, was convicted under the criminal provisions in this Court in United States Court for the District of Colorado.

He was also admitted to liability under the civil provisions of that statute in the amount of $275,000 in this case.

How would it serve the purposes of Landrum Griffin to give Mr. Guidry his pension in this case? Those statutes must be read in pari materi, if that's the way you pronounce it, with ERISA.

A big hole will be blown in those statutes if this Court' sends the message to the few corrupt labor union officials which are out there that they can manipulate these Taft-Hartley trust funds for their own purposes, and embezzle money and leave this Court and the whole world in a quandary as to whether it was embezzled from the union or trust funds, and then collect their pension funds after they get out of jail and foreswear that they have any other assets.

That's what happened in this case. Nobody really decided yet whether some of this money was stolen from the union or the pension funds. There has been no judicial determination of that.

The way things have shaken out, though, the trust funds through bonds and other sources of compensation don't have claims against Mr. Guidry anymore, and we do, the union does, because he stole in accordance with I think four or five different schemes which are before the Court in evidence. They were admitted to in the criminal case.

The way things shake out, we are holding the bag. We are the ones who lost the money, so it is really irrelevant who he stole the money from. The point is he used the trust funds as a manipulative scheme to advance his own interests, and now he is trying to tell the Court these trust funds set up under the Taft-Hartley law, designed to prevent corruption, is going to enable him to further his corruption.

I wasn't going to get into technical issues like preemption, Your Honor, but whether you read over the cases like the *Vink* case, and like the *Merry* case, and like the *Cox* case, and the *Ellis* case, and the *Cox* case is a case we cited, and we rely upon. Those cases talk about preemption in terms of preempting a competing state law principle. In the *Merry* case the Second Circuit decided they weren't going to preempt state laws relevant to a marital status, family. support, et cetera.

In the *Ellis* case, which is wrongly decided, they decided they weren't going to preempt state principles of equitable jurisdiction, whatever that means.

In this case we don't have a collision between a

state law principle like marriage, or a state law principle like theft, with a federal law principle. We have two federal principles in a sense at tension with one another.

I said earlier I didn't think they were in complete conflict of one another because I think the purpose of all these laws is to protect the worker. So in that sense they are not in conflict with one another.

They are in tension with one another because they approach protecting the worker from different angles. Two of the laws, Taft–Hartley and Landrum–Griffin say we want to protect the workers from corrupt labor unions, and union officials.

I stand here as a union lawyer and I tell you the worst enemy of the American working man is the corrupt union official, and that is the man who stands before the Court asking for justice, and in that context we also have a law that tries to protect people's pensions from employers, from arbitrary and capricious employers, from arbitrary and capricious pension officials.

Now, I say that those laws can be read together, and those laws can be reconciled, and when you reconcile those laws, and you do that process, you come to the conclusion that the Court doesn't have to go very far in opening the floodgates of litigation to simply hold this is a case that's unique; that has not been decided before, and that the Court is going to exercise its equitable jurisdiction, and for that matter we don't have to go into equitable jurisdiction, we can talk about the Court's authority to construe different federal laws.

I certainly don't think that Congress had in mind, when they passed ERISA, to partially repeal Landrum–Griffin and Taft–Hartley. I haven't examined the legislative history that closely, but I would bet if one did one would never find any reference in the legislative history to protecting the corrupt union official in this kind of situation, and I don't think the Court has to do that. don't think the Court has to overrule ERISA.

What I think the Court should do in this case is simply rule that in the context of this case, where we are not talking about the preemption of state laws, that has nothing to do with this case. This case is different from those state cases on that ground; that the Court is simply going to construe the federal laws which are at issue in this case so as to allow the union to recover the money — moneys that it has lost through a constructive type trust arrangement.

The garnishment issues that are before the Court, I can tell you are secondary as far as we are concerned. We think that the better way for the Court to approach this case is through the sixth claim for relief in the complaint.

THE COURT: One of the things that bothers me about garnishment is I don't know where this would be with respect to exemptions.

MR. GOLDHAMMER: That's right.

THE COURT: Where we have a wage exemption applicable to a garnishment for this purpose.

MR. GOLDHAMMER: That's right, and you know it is possible that that gets you into another area of statutory interpretation just exactly like the one I have been talking about, because you take an anti–alienation provision in ERISA, and you take another provision in the Federal Consumer Protection Act, I believe that says you can only garnish 25 percent of wages, and includes in that the avails of pension funds. Did ERISA overrule and repeal the provisions of the Consumer Protection Act when it says you can't garnish anything relative to pension funds, and that's a sticky, knotty issue of statutory interpretation that I don't think the Court should get into.

THE COURT: Which is why you are arguing for the constructive trust?

MR. GOLDHAMMER: Yes, based upon the sixth claim of the complaint, the constructive trust claim, the claim that is based, and as far as that's concerned, Your Honor, I believe the sixth claim of the complaint incorporated all other claims, and incorporates a Landrum–Griffin claim.

So we are dealing with the federal labor laws relating to labor unions and labor union officials, and corrupt labor union officials, and I just don't think the Court ought to say that little provision in 29 United States Code Section 1056 (d) , wbich talks about the alienation in pension funds intended to give a license to union officials, and by the way, the word "pension" and the word "union" go together in this country, and that is recognized in the Taft-Hartley law.

One of the great advances the union has done is pensions, and it is frequent that union officials will sit on the boards of pension funds. That's what a Taft-Hartley fund is all about.

In this case the business manager, of the union, who happens to be in the courtroom today, is also on the pension funds, and that's the way Taft-Hartley is set up, and that's the way Taft-Hartley envisioned that it would be.

If we give license to these officials who serve in dual fiduciary capacities — this is not a question of only fiduciary breach. This guy was a fiduciary to two separate entities, and he did, as a factual matter, make some checks out to himself that were in excess of the funds that were supposed to go to the union.

It is just that the pension funds, through bonds and so forth, have been compensated for money, and they aren't before the Court requesting that money today, but this Plaintiff has breached — was in a special kind of capacity in two fronts; he was a fiduciary for the union and he was a fiduciary for the trust funds, and he breached those, and now he wants to stand behind a little provision in ERISA, which law was passed also to protect workers and their families, and he did more damage to workers and their families than one can possibly comprehend.

So that's the way the Court I think could come down in this case,-and I know that the Court —

THE COURT: So what would happen? The Court would enter an order that the present accrued amounts be paid to the intervenor on its judgment, and then what, monthly payments as they accrue?

MR. GOLDHAMMER: There is another way of doing that and I think the Court has the authority to get an actuarial value, the present actuarial value of those pensions, and simply pay them, in order to save the — you know — extension of time, or the drawn-out process of maybe we would — you know — I don't know how long Mr. Guidry is going to live, another 20, 30 years.

THE COURT: Under these plans what happens at his death? They don't make any payments after death, do they?

MR. GOLDHAMMER: No, they do not. it is my understanding — I don't represent them, but it is my understanding they don't pay any payments after death.

THE COURT: It is like an annuity? You pay — they keep paying monthly until they die?

MR. GOLDHAMMER: Yes, and Mr. Sweeney can correct me if I am wrong about that, but that is my understanding.

Therefore, it might be simpler to simply have an actuarial value of those pensions.

THE COURT: But if the Plaintiff is entitled to these moneys, but for the intervention, if you would follow that argument, then he is entitled to what's left after $275,000 plus interest is paid, if he outlives that in terms of how that comes down on the monthly payments.

MR. GOLDHAMMER: Right.

THE COURT: so if we dealt with it in terms of an actuarial value we would be denying him a possible, like a future interest?

MR. GOLDHAMMER: That is true. The countervailing argument is that that interest will accrue when mr. Guidry is approximately 145 years old.

THE COURT: well, I didn't do any arithmetic on that.

MR. GOLDHAMMER: I mean, obviously we worked it out when we stipulated to the judgment, and it is possible that he will live that long I suppose. one can't discount anything in this world, but realistically if one were to look at the pension values, Mr. Guidry is not going to outlive that $275,000. His pensions just simply aren't

worth that much, and that's why I think the Court has to look at the actuarial value to make sure of that fact.

I could be exaggerating too on that 145 figure. He would have to live to an extremely old age, older than anyone is attributed to live in the modern era with exception of maybe some biblical figures, Abraham or something who lived a long time, but he is not going to live that long.

For the convenience of the parties it might be just as well to distribute those funds now. The alternative is to pay them as they come due into the constructive trust. From the union's point of view that takes the risk also that Mr. Guidry will die pretty soon, which is much likely possible than live to a 140, and the union would rather see that money right now as opposed to much more down the road.

THE COURT: Doesn't that also involve a fiduciary judgment by the plan trustees, because from their standpoint they are the ones who are paying, and they could save money by doing it monthly until he dies.

MR. GOLDHAMMER: Well, I suppose then that would involve their position in this case, and as I understand it, they are not opposed to paying a lump sum payment in this particular case, although Mr. Sweeney would have to be the one to finally speak to that.

THE COURT: I understand.

MR. GOLDHAMMER: Okay. Have you got any more questions?

THE COURT: No, thank you. Rebuttal argument on behalf of the Plaintiff, if any?

MR. SERRUTO: Yes, Your Honor, if that's appropriate?

THE COURT: it is.

MR. SERRUTO: If I understand the Fund's contention Your Honor, they have essentially abandoned their claim that the benefits are forfeitable, and wish to pay Mr. Guidry's benefits into a constructive trust for the benefit of the union.

I believe summary judgment on behalf of the Plaintiff is proposed for all the funds, and I won't presume

to say they have abandoned, that they have their brief, and that's still before the Court, but the funds are basically arguing that constructive trust should be imposed, and that's not forfeiture, Your Honor, that is attached.

That's the acknowledgement that those benefits are owed to Mr. Guidry, and that they should be otherwise paid.

The union urges that this is a union case. Bank employees regulated by the federal government through statute, through regulations, would make the same argument. All fiduciaries will make this argument.

Mr. Guidry was a fiduciary; whether he was a union fiduciary, a bank fiduciary, a fiduciary of a private plan, a trustee of a private plan, I believe the argument, Your Honor, is the same.

There is no ERISA exception for union fiduciaries or fiduciaries of any kind. The exception urged by the intervenor has no basis in law.

The union's argument by itself seems to have abandoned the state law equitable claims that were urged through nine-tenths of its brief; that state law equitable principles are not preempted by ERISA.

There is no legal or equitable attachment permissible under ERISA, none, for any purpose.

Mr. Guidry, he had other assets, wouldn't, couldn't shelter them from the reach of his judgment creditors.

ERISA, the Congress sought to protect these benefits. However appalling the facts may be in this case Congress faced up to that.

The exceptions urged by the union today would be urged additionally by all types of fiduciaries, Your Honor. He was a fiduciary, and he is protected by the facts, and he is entitled to his pensions. If any diversion of these benefits, as attachment, that attachment is prohibited. Thank you for your time this morning, Your Honor.

THE COURT: All right. Well, my view of the case isn't much different today from what it was approximately a year ago in August when we were in Court. We have had these extensive briefs, and they have been helpful, and I am going

to put this into a formal opinion because I think it deserves that rather than simply this pronouncement from the bench, but I have no doubt about how the case should come out and so I will tell you, and that is, that first of all, I believe that the Plaintiff is entitled to summary judgment on his claims against the plans for the reason that Section 1053 (a) is as absolute a prohibition against forfeiture as the congress could write. That's what they intended. No forfeiture for any reason.

So we can't create a criminal exception to that any more than we could except the other bad boy types of contentions that have been made.

So we have the pension benefits owing to the Plaintiff. The intervenor attempts to interdict it for the collection of its $275,000 judgment. The Court is going to grant that.

As I think I said the last time, I believe that the Congress, by providing that remedy under ERISA in a court is recognizing that the courts have the equitable powers of a court, and can accordingly exercise judgment under the factual circumstances presented.

The question then is whether the other prohibition in ERISA, the anti-attachment, non-alienation provisions in 1056, whether that amounts to a limitation on the Court's equitable powers. I think that's the most narrow focus of the issue, because in the absence of that it is clear what the Courts should do, and in analyzing that particular question it does seem to me to be appropriate to recognize who the intervenor is, who the victim is and what the national policies are that relate to that.

There is no question that since the enactment of Taft-Hartley originally, that the Congress of the United states has maintained, the government of the United States has maintained a consistent and firm policy with respect to organized labor, and for the protection of workers who organize in labor organizations.

They seek to protect them in Taft-Hartley, and in Landrum-Griffin, and in ERISA from all who might abuse them,

which includes their own leaders.

Now, I have not before seen a case under Landrum-Griffin brought by a union as compared to a worker against the union. So, in terms of if we are looking at this as a narrow standing question, there could be a problem, but the point is not that. The point is whether the Court's imposition of a constructive trust is a violation of a Congressional policy, and it is my view that to the contrary, it is not only not a violation of Congressional policy, it is in furtherance of it because if you step back from the intricacies of the case, if you step back from looking at this particular statutory section, or that section, and see what this is really about, it is whether a union official who abuses the fiduciary duty, and the trust involved should be able to, after doing his time in prison, walk away with the loot, and if we were to ask any man on the street whether that's a fair and just result the answer is obvious.

So that's how I am going to rule, for the Plaintiff on his summary judgment motion, for the intervenor in its summary judgment motion.

Now, the question is, what will we do about this in terms of the judgment? I will return to counsel on this because, as I indicated in my colloquy with Mr. Goldhammer, in a technical sense I think that the Court would impose a constructive trust on the amounts that have accrued, and are immediately payable on the Plaintiff's claims in his judgment, and then further provide that future payments are subject to the same constructive trust and must be made to the intervenor on its judgments.

This notion about directing that there be an evaluation of this actuarially, and a payoff figure arrived at, I don't see how the Court has the authority to do that in the pleadings as they stand.

Mr. Sweeney, do you wish to comment on that? it is your clients' money we are talking about. You are the one who pays no matter who you pay.

MR. SWEENEY: I think what the Court proposed is fair and equitable insofar as representing my client.

THE COURT: So we order the accrued payments over,

and then pay ents as they do accrue in the future?
MR. SWEENEY: And make those payable directly to Local 9?
THE COURT: Yes. Mr. Serruto, do you see it differently? Obviously you see it differently in terms of the final result, but in terms of the mechanics, I don't see that we can do it any other way, do you?
MR. SERRUTO: Your Honor, this eliminates the possibility of bringing before the court the issue of the exemptions to which fir. Guidry needs to place before the Court.
THE COURT: No. This isn't a garnishment. I am imposing a constructive trust. There are no exemptions. I am not going down that garnishment road.
MR. SERRUTO: The position of the Court would then be he is entitled to no exemptions then?
THE COURT: That's right. He doesn't get anything until $275,000 plus interest has been paid, the way I see it.
MR. SERRUTO: Your Honor, initially my thought is that I would need to verify, and opposing counsel has been very cooperative in past efforts, the amounts owed under three plans, and I would like to participate in that.
THE COURT: Well, if you, for example, work something out, you work something out. I am talking about how I handle an order, and that's the way I see it. I have to enter judgment, and that's the form of judgment that I am proposing based on my analysis.
MR. SERRUTO: I don't see any other way, Your Honor, than to have a monthly payment is made in that fashion
In terms of the mechanics —
THE COURT: As I said, now I will do a fairly brief written opinion. Your time for appeal doesn't start running now. I simply want to let you know how I am going to come out now when we are —
MR. SERRUTO: My time for appeal?
THE COURT: Does not begin to run until the entry of judgment. There will be a memorandum and order for the entry of judgment, and the entry of judgment by the clerk,

and that's what triggers your time for appeal.
MR. SERRUTO: Thank you for that, Your Honor.
THE COURT: Okay.
MR. SWEENEY: Thank you.
THE COURT: Thank you. Court is in recess.
(Court was in recess at 11:30 a.m.)
I, Janica Martynow, do hereby certify that the above and foregoing is a true and correct transcript of my shorthand notes taken at the time and place as set forth on page one hereof.
Dated at Denver, Colorado, this fourteenth day of October, 1986.

/S/ Janica Martynow

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
FEB 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1105

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

CURTIS GUIDRY,

Petitioner,

v.

SHEET METAL WORKERS NATIONAL PENSION FUND;
SHEET METAL WORKERS LOCAL UNIONS AND COUNCILS PENSION PLAN;
SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 9;
SHEET METAL WORKERS LOCAL NO. 9 PENSION FUND, et al.

Respondents.

BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Brauer & Buescher, P.C.
Walter C. Brauer III
1563 Gaylord
Denver, CO 80206
(303) 333-7751
(Counsel of Record)

Raymond J. Sweeney, Esq.
1898 L. St. N.W.
Suite 1250
Washington, DC 20036
(202) 659-4656
(Counsel for Respondents)

QUESTIONS PRESENTED

I. Would a Supreme Court opinion in this unique case resolve the conflicting decisions among various Circuits regarding the applicability of ERISA's anti-alienation provision when a Plan beneficiary has engaged in criminal misconduct?

II. Should this Court grant certiorari to review the Tenth Circuit's decision construing a procedural aspect of Colorado garnishment law applicable in the Federal Courts under F.R.C.P. 69?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
OPINIONS BELOW 2
PERTINENT STATUTES 2
STATEMENT OF THE CASE 4
GROUNDS WHY THIS CASE SHOULD NOT BE REVIEWED IN THIS COURT 6

I. A SUPREME COURT DECISION WILL NOT RESOLVE THE SPLIT AMONG THE CIRCUITS ON WHETHER ERISA'S ANTI-ALIENATION PROVISIONS APPLY TO CRIMINAL BENEFICIARIES 6

II. THIS COURT SHOULD NOT REVIEW THE TENTH CIRCUIT'S STATE LAW DETERMINATION THAT GUIDRY FAILED PROPERLY TO ASSERT HIS CLAIM FOR A 75% EXEMPTION 10

CONCLUSION 11

TABLE OF AUTHORITIES

PAGE

Cases

Crawford v. La Boucherie Bernard, Ltd., 815 F.2d 117 (D.C. Cir. 1987) Cert. denied 108 Sup. Ct. 735 (1988) 7, 8, 9

Cummings By Techmier v. Briggs and Stratton Retirement Plan, 797 F.2d 383 (7th Cir. 1986) Cert. denied 107 Sup. Ct. 648 (1986) 7

Ellis Nat'l Bank of Jacksonville v. Irving Trust, 786 F.2d 466 (2nd Cir. 1986) 7, 9

St. Paul Fire and Marine Insurance v. Cox, 752 F.2d 550 (11th Cir. 1985) 7, 9

United Metal Products v. National Bank of Detroit, 811 F.2d 297 (6th Cir. 1987) Cert denied 108 Sup. Ct. 1494 (1988) 7, 9

Statutes

Colorado Rules of Civil Procedure
103 ..... 3, 4, 5, 10

Consumer Credit Protection Act
15 U.S.C. § 1673 ..... 6, 10

Employee Retirement Income Security Act of 1974
29 USC § 1002 (21) (A) 2
29 USC § 1056 6
29 USC § 1109 ..... 2, 9

Federal Rules of Civil Procedure
Rule 19 5
Rule 54 (b) 5
Rule 69 ..... i, 10

Labor Management Relations Act
29 USC § 186 ..... 3, 5, 9

Labor Management Reporting and Disclosure Act
29 USC § 501 ..... 5, 9
29 USC § 501 (a) 2
29 USC § 501 (c) 5

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

No. 88-1105

CURTIS GUIDRY,

Petitioner,

v.

SHEET METAL WORKERS NATIONAL PENSION FUND;
SHEET METAL WORKERS LOCAL UNIONS AND COUNCILS PENSION PLAN;
SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 9;
SHEET METAL WORKERS LOCAL NO. 9 PENSION FUND, et al.

Respondents.

BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Respondents Sheet Metal Workers National Pension Fund; Sheet Metal Workers Local Unions and Councils Pension Plan; Sheet Metal Workers International Association, Local 9; and Sheet Metal Workers Local No. 9 Pension Fund, et al. respectfully oppose a writ of certiorari to review the Tenth Circuit Court of Appeals decision in this proceeding.

OPINIONS BELOW

The Tenth Circuit opinion is reported at 856 F.2d 1457 and 9 EBC 2553. The opinion of the United States District Court for the District of Colorado is reported at 641 F. Supp. 360 and 7 EBC 2044.

PERTINENT STATUTES

The Labor Management Reporting and Disclosure Act. 29 USC § 501 (a) provides as follows:

> The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members ... and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization.

The Employee Retirement Income Security Act of 1974 ("ERISA"), provides in 29 USC § 1002(21)(A) as follows:

> ... a person is a fiduciary with respect to a Plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such Plan or exercises any authority or control respecting management or disposition of its assets ...

The Employee Retirement Income Security Act of 1974 provides in 29 USC § 1109 as follows:

> (a) any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach ... and shall be subject to such other equitable or remedial relief as the court may deem appropriate ...

The Labor Management Relations Act, 29 USC § 186 provides as follows:

> (a) it shall be unlawful for any employer ... to pay, lend or deliver ... any money or other thing of value
>
> (1) to any representative of any of his employees ... or
> (2) to any labor organization ...
>
> (c) the provisions of this section shall not be applicable ... (5) with respect to money or other thing of value paid to a trust fund established by such representative...

The Colorado Garnishment Rule, Colorado Rules of Civil Procedure 103, § 6 provides as follows:

> (b)(1) If a judgment debtor objects to the initial or a subsequent calculation of the amount of exempt earnings, the judgment debtor shall have five (5) days from the date of the receipt of the copy of the writ of garnishment or calculation of the amount of exempt earnings for subsequent pay periods, within which to resolve the issue of such miscalculation by agreement with the garnishee.

(b)(2) If the judgment debtor's objection is not resolved with the garnishee within five (5) days upon good faith effort, the judgment debtor may file a written objection setting forth, with reasonable detail, the grounds of such objection. Such objection must be filed within ten (10) days from receipt of the copy of writ of garnishment or calculation of the amount of exempt earnings for subsequent pay periods.

(d) (1) Notwithstanding the provisions of § 6(a) (2) and § 6(b) (1) of this Rule, a judgment debtor failing to make and file a written objection or claim of exemption within the time therein provided, may, at any time within six (6) months from receipt of the copy of the writ with notice or a copy of the writ with continuing garnishment or the calculation of the amount of exempt earnings, move the court in which the judgment was entered to hear an objection or claim of exemption as to any earnings of property levied in garnishment which the judgment debtor claims to have been miscalculated or which the judgment debtor claims to be exempt.

STATEMENT OF THE CASE

From 1964 until his resignation on September 30, 1981, petitioner Curtis Guidry ("Guidry") was chief executive officer of respondent Sheet Metal Workers International Association Local 9 ("the Union"). From at least 1977 through September 30, 1981, Guidry was also a trustee of respondent Sheet Metal Workers Local No. 9 Pension Fund. At the time Guidry resigned as a Union officer, $998,281 was missing and unaccounted for from the union.

On March 31, 1982, Guidry pled guilty under 29 USC § 501 (c) to embezzling $377,301.53 from the Union between April 1, 1977 and April 30, 1981. His guilty plea included a confession that he used five different schemes to steal from the Union, two of which involved embezzling money that was in transit between the Union's ERISA benefit plans and the Union. The latter schemes were made possible only by the fact that Guidry acted as a Trustee not only to the Union but to the Union's Pension and Health Trust Funds established pursuant to § 302 of the Labor Management Relations Act, (29 USC § 186). Thus, Guidry made joint misuse of his two different roles as Trustee, to accomplish part of his embezzlement.

After applying for and being denied his pension benefits by two of the Pension Funds, Guidry sued those Funds in the United States District Court for the District of Colorado claiming his pensions. The Union intervened, asserting civil liability against Guidry under the Labor Management Reporting and Disclosure Act, 29 USC § 501. The Union also joined the Local Pension Fund as a Rule 19 party. The Union and Guidry stipulated to entry of a $275,000 judgment in the District Court and that judgment was finalized pursuant to Rule 54(b) F.R.C.P. The Union then attempted to seize Guidry's pension benefits by garnishing them in accordance with Colorado's garnishment law and by seeking imposition of a constructive trust against future pension benefits for the benefit of the Union.

The Funds answered the Union's writs of garnishment under Colorado Rules of Civil Procedure 103 that it owed no money to Guidry, and notified Guidry's counsel of its response. Guidry filed no objection to the garnishment and the response thereto within the time limits prescribed in C.R.C.P. 103 § 6 on any basis.

The District Court ruled that the pension funds owed Guidry his pensions, but imposed a constructive trust on the pension proceeds for the benefit of the Union, ordering payment of the pension benefits to the Union until the judgment plus interest is paid. The court ruled that ERISA's anti-alienation provision (29 USC § 1056(d) (1)) did not shield a union officer who damaged the union and its benefit plans through his dual breaches of trust.

The Tenth Circuit also ruled that the anti-alienation provision of ERISA does not protect a dishonest fiduciary. The Tenth Circuit further held that Guidry's claim for a 75% exemption under the Consumer Credit Protection Act (15 U.S.C. § 1673) was not properly brought before the District Court because Guidry failed to object to the Union's garnishment after being served with the garnishments under C.R.C.P. 103, the applicable state law procedure. The Court did not rule that Guidry failed to object to the garnishments in the District Court, only that he failed to do so properly in accordance with applicable state law procedures.

GROUNDS WHY THIS CASE SHOULD NOT BE REVIEWED IN THIS COURT

I. A SUPREME COURT DECISION WILL NOT RESOLVE THE SPLIT AMONG THE CIRCUITS ON WHETHER ERISA'S ANTI-ALIENATION PROVISIONS APPLY TO CRIMINAL BENEFICIARIES

Because of the unique features of this case, this Court would not resolve the limited conflict among three circuits regarding the applicability of ERISA's anti-alienation provision (29 USC § 1056(d)) to criminal beneficiaries by granting certiorari here.

Petitioner cites six cases which, he contends, divide on the question of whether the courts should imply a "criminal misconduct exception" to ERISA's anti-alienation provision. Actually, only three of those cases turn on that precise issue, *St. Paul Fire and Marine Insurance v. Cox,* 752 F.2d 550 (11th Cir. 1985); *Ellis Nat'l Bank of Jacksonville v. Irving Trust,* 786 F.2d 466 (2nd Cir. 1986); and *United Metal Products v. National Bank of Detroit,* 811 F.2d 297 (6th Cir. 1987) Cert. denied 108 Sup. Ct. 1494 (1988). In each of those cases employee beneficiaries under their employers' pension plans criminally embezzled from their employers. The employers, or parties standing in their shoes, then sought recovery against the employees' benefit plan assets. None of these three cases involved the breach of fiduciary duties. Furthermore, in these cases the employees clearly embezzled from the employer, so setoff by the pension funds was not an issue. The Second and Sixth Circuits held that the anti-alienation provisions prevented the employers or their surrogates from obtaining pension assets, and the Eleventh Circuit held to the contrary.[1]

The case cited by petitioner which most closely parallels the instant one is *Crawford v. La Boucherie Bernard, Ltd.,* 815 F.2d 117 (D.C. Cir. 1987) Cert. denied 108 Sup. Ct. 735 (1988). In that case, plan fiduciaries who were also beneficiaries misapplied plan assets for their own benefit, and claimed the protection of the anti-alienation provision in opposing the application of their plan assets to offset their judgment debts. The D.C. Circuit held, as did the Tenth Circuit in the present case, that ERISA was enacted to deter and redress breaches by trustees, not to insulate them, and refused to allow the defalcating fiduciaries to invoke ERISA to profit from their violations of trust.

[1]One of the other cases cited by petitioner, *Cummings By Techmier v. Briggs and Stratton Retirement Plan,* 797 F.2d 383 (7th Cir. 1986) cert denied 107 Sup. Ct. 648 (1986) is entirely irrelevant, since that case does not concern the applicability of 29 USC § 1056(d) at all. Furthermore the Seventh Circuit in that case stated:

> By this decision, we do not diminish the inherent and statutory equitable power of the federal courts in ERISA cases.

797 F.2d at 391.

The present case most closely resembles *Crawford,* because it too involves breaches of fiduciary duties. In fact, the present case is much stronger than *Crawford* because Guidry actually had two fiduciary capacities, one as Union officer and the other as Trustee of the Union's benefit plans, and he accomplished some of his embezzlements by violating both positions of trust simultaneously. The District Court and the Tenth Circuit premised their decisions on Guidry's special role as both a Union and a benefit plan fiduciary. As the Tenth Circuit stated,

> Congress did not intend for ERISA's anti-alienation provision to protect dishonest *fiduciaries*. Simply, there is no indication in ERISA's statutory language or legislative history that an unscrupulous *trustee* should be shielded from the consequences of his misdeeds.

(Emphasis added) 856 F.2d at 1463.

Hence, insofar as the Tenth Circuit's decision rests on Guidry's role as a fiduciary, only the *Crawford* case is similar, and it does not conflict with the Tenth Circuit decision. A Supreme Court opinion on the merits here would not resolve the independent conflict among the Second, Sixth and Eleventh Circuits noted above.

Furthermore, while Guidry would emphasize the technical distinctions between the respondent Union and its affiliated benefit plans, the Tenth Circuit recognized the close affinity among all respondents and treated the impoundment of Guidry's trust assets as a setoff as opposed to a third party action. The Tenth Circuit was justified in doing so to prevent Guidry from controlling the outcome of this case by arbitrarily deciding from which of the respondents he was stealing, thereby determining whether he would be subject to setoff or only a third party proceeding.

In this respect, the present case again resembles *Crawford,* and contrasts with the Second, Sixth and Eleventh Circuit cases, where the conflict resides. No Circuit case holds that the anti-alienation provision in ERISA prohibits the setoff of trust assets. The only case on point, *Crawford*, agrees with the Tenth Circuit in permitting setoffs. On that basis as well, this case stands apart from the conflict presented in *Ellis,* supra, *United Metal Products,* supra, and *Cox,* supra.

Additionally, this case is *sui generis* among the six cases cited by Guidry, because its central figure is a corrupt union official. Corruption in unions has long attracted congressional concern, and several federal laws were enacted to deter it. Accordingly, in this case, the anti-alienation provision must be read in conjunction with the Labor Management Relations Act (29 USC § 186), Landrum-Griffin (29 USC § 501) and the provisions of ERISA establishing liability for breaches of fiduciary duties (29 USC § 1109). A corrupt union officer who also serves as a benefit plan trustee is in a unique position consciously to manipulate the anti-alienation provision to frustrate the purposes of these several federal statutes. For that reason alone, this case must be regarded as distinct from the others. This Court's opinion in this case would not resolve the conflict on the bare "criminal misconduct" issue.

Finally, this case presents an issue of state procedural law which could well prevent the Supreme Court from reaching the conflict among the circuits on the anti-alienation problem. The Tenth Circuit held that Guidry did not properly present his claim for a 75% exemption under the Consumer Credit Protection Act, because he failed to object to the Union's garnishment as required by Colorado's procedural rule. That holding would seem to apply equally to Guidry's claim for a 100% exemption under ERISA's anti-alienation provision. He likewise did not assert his claim for that exemption in accordance with Colorado Rule of Civil Procedure 103. Thus, if this Court grants Guidry's petition, it will confront a

procedural issue under Colorado's garnishment rule before grappling with the anti-alienation issue, if, indeed, it ever gets that far.

Thus, this is not the case in which to resolve the limited conflict among the Circuits regarding the applicability of ERISA's anti-alienation provision to criminal plan beneficiaries. Too many legitimate obstacles prevent a clear disposition of that conflict here.

II. THIS COURT SHOULD NOT REVIEW THE TENTH CIRCUIT'S STATE LAW DETERMINATION THAT GUIDRY FAILED PROPERLY TO ASSERT HIS CLAIM FOR A 75% EXEMPTION

Petitioners completely mischaracterize the Tenth Circuit's decision on whether Guidry can now assert entitlement to a 75% exemption under the Consumer Credit Protection Act. The Tenth Circuit did not rule that Guidry failed to raise the issue in the District Court, but that he did not do so properly under the Colorado Garnishment Rule, C.R.C.P. 103. State post-judgment procedures apply in Federal Court under Rule 69 F.R.C.P.

No special and important reasons militate for this Court's review of the Tenth Circuit's determination of a state law procedural issue. Petitioner does not dispute that he filed no objections to the garnishments under the state rule at any time. The Tenth Circuit's conclusion that petitioner's failure to do so precludes him from raising the issue after the Rule 103's time limits have expired is sound.

CONCLUSION

For the above reasons, the petition for writ of certiorari should be denied.

January, 1989.

Respectfully submitted,

BRAUER & BUESCHER, P.C.

Walter C. Brauer III
1563 Gaylord St.
Denver, CO 80206
(303) 333-7751
(Counsel of Record)

Raymond J. Sweeney, Esq.
1898 L. St. N.W.
Suite 1250
Washington, DC 20036
(202) 659-4656
(Counsel for Respondents)

AMICUS CURIAE

BRIEF

(3)

No. 88-1105

Supreme Court, U.S.
FILED
JUN 5 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

CURTIS GUIDRY, PETITIONER

v.

SHEET METAL WORKERS' NATIONAL PENSION FUND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

KENNETH W. STARR
Solicitor General
DAVID L. SHAPIRO
Deputy Solicitor General
CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JERRY G. THORN
Acting Solicitor of Labor
ALLEN H. FELDMAN
Associate Solicitor
MARY-HELEN MAUTNER
Counsel for Appellate Litigation
ELLEN L. BEARD
Attorney
Department of Labor
Washington, D.C. 20210

36 pp

QUESTIONS PRESENTED

1. Whether the anti-alienation provision of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1056(d)(1), bars the imposition of a constructive trust on the pension benefits of a former union officer who embezzled union funds.

2. If ERISA does not bar such a remedy, whether 75 percent of petitioner's monthly pension benefits are protected from garnishment by the federal Consumer Credit Protection Act, even if petitioner did not object to the garnishment in accordance with the procedural requirements of state garnishment law.

TABLE OF CONTENTS

	Page
Statement	1
Argument	5
Conclusion	21

TABLE OF AUTHORITIES

Cases:

Alessi v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981)	6, 7
AT & T v. *Merry*, 592 F.2d 118 (2d Cir. 1979)	3
Christ Hospital v. *Greenwald*, 82 Ill. App. 3d 1024, 403 N.E.2d 700 (1980)	10
Commercial Mortgage Ins., Inc. v. *Citizens Nat. Bank*, 526 F. Supp. 510 (N.D. Tex. 1981)	10
Crausman v. *Curtis Wright Crop.*, 676 F. Supp. 1302 (D.N.J. 1988)	14
Crawford v. *La Boucherie Bernard, Ltd.*, 815 F.2d 117 (D.C. Cir.), cert. denied, 108 S. Ct. 328 (1987)	4, 11, 12-13
Donovan v. *Hamilton County Municipal Court*, 580 F. Supp. 554 (S.D. Ohio 1984)	19
Ellis National Bank v. *Irving Trust Co.*, 786 F.2d 466 (2d Cir. 1986)	3, 6, 10
First National Bank v. *Columbia Credit Corp.*, 179 Colo. 242, 499 P.2d 1163 (1972)	19-20
Fremont v. *McGraw-Edison Co.*, 606 F.2d 752 (7th Cir. 1979), cert. denied, 445 U.S. 951 (1980)	3
General Motors Corp. v. *Buha*, 623 F.2d 455 (6th Cir. 1980)	10
Helmsley-Spear, Inc. v. *Winter*, 74 A.D.2d 195, 426 N.Y.S.2d 778 (1980), aff'd, 52 N.Y.2d 984, 419 N.E.2d 1078, 438 N.Y.S.2d 79 (1981)	10
Highway Truck Drivers & Helpers v. *Cohen*, 334 F.2d 378 (3d Cir.), cert. denied, 379 U.S. 921 (1964)	16
Hodgson v. *Cleveland Municipal Court*, 326 F. Supp. 419 (N.D. Ohio 1971)	19
Local 92, Int'l Ass'n of Bridge Workers v. *Norris*, 383 F.2d 735 (5th Cir. 1967)	16

Cases – Continued: Page

Lutes v. *Lutes*, 722 S.W.2d 314 (Mo. Ct. App. 1986) 20
Mackey v. *Lanier Collection Agency & Service, Inc.*, 108 S. Ct. 2182 (1988) 5
Morrissey v. *Curran*, 650 F.2d 1267 (2d Cir. 1981) 16
Morton v. *Mancari*, 417 U.S. 535 (1974) 17
NLRB v. *Amax Coal Co.*, 453 U.S. 322 (1981) 8, 18
Radzanower v. *Touche Ross & Co.*, 426 U.S. 148 (1976).. 17
St. Paul Fire & Marine Ins. Co. v. *Cox*, 752 F.2d 550 (11th Cir. 1985) 3, 7, 12
Shaw v. *Delta Air Lines, Inc.*, 463 U.S. 85 (1983) 15
Tenneco Inc. v. *First Virginia Bank*, 698 F.2d 688 (4th Cir. 1983) 10
United Metal Products Corp. v. *National Bank*, 811 F.2d 297 (6th Cir. 1987), cert. dismissed, No. 86-1786 (Apr. 22, 1988) 4, 6, 13
Vink v. *SHV N. A. Holding Corp.*, 549 F. Supp. 268 (S.D.N.Y. 1982) 3, 7, 13
Winer v. *Edison Bros. Stores Pension Plan*, 593 F.2d 307 (8th Cir. 1979) 3, 7

Statutes and regulations:

Consumer Credit Protection Act, 15 U.S.C. 1671 *et seq.* 5, 18
15 U.S.C. 1671(a) 19
15 U.S.C. 1672(a) 5, 19
15 U.S.C. 1672(c) 5, 19
15 U.S.C. 1673 19
15 U.S.C. 1673(a) 19
15 U.S.C. 1673(c) 19, 20
15 U.S.C. 1676 19
15 U.S.C. 1677 19
Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*:
§ 2(a), 29 U.S.C. 1001(a) 14
§ 3(14)(C), 29 U.S.C. 1002(14)(C) 2
§ 3(14)(D), 29 U.S.C. 1002(14)(D) 2
§ 203(a), 29 U.S.C. 1053(a) (1982 & Supp. 1987) 2, 7
§ 206(d)(1), 29 U.S.C. 1056(d)(1) 3, 8

Statutes and regulations – Continued: Page

§ 206(d)(2), 29 U.S.C. 1056(d)(2) 8
§ 206(d)(3), 29 U.S.C. 1056(d)(3) (Supp. V 1987) 9
§ 403(c)(1), 29 U.S.C. 1103(c)(1) 8
§ 404, 29 U.S.C. 1104 11
§ 404(a)(1)(A), 29 U.S.C. 1104(a)(1)(A) 8
§ 406, 29 U.S.C. 1106 ..... 8, 11
§ 408, 29 U.S.C. 1109 13
§ 502, 29 U.S.C. 1132 (1982 & Supp. V 1987) 9, 11
§ 502(a)(1)(B), 29 U.S.C. 1132(a)(1)(B) 2
§ 502(a)(2), 29 U.S.C. 1132(a)(2) 13
§ 514(b)(7), 29 U.S.C. 1144(b)(7) (Supp. V 1987) 9
§ 514(d), 29 U.S.C. 1144(d) 15, 16
Labor-Management Relations Act, 1947, Tit. II, 29 U.S.C. 171 *et seq.* 4
§ 302(c)(5), 29 U.S.C. 186(c)(5) 8
Labor-Management Reporting and Disclosure Act of 1959:
§ 501, 29 U.S.C. 501 ..... 11, 16
§ 501(a), 29 U.S.C. 501(a) 2, 15
§ 501(b), 29 U.S.C. 501(b) 15, 16
§ 501(c), 29 U.S.C. 501(c) 1, 11, 15
§ 603(a), 29 U.S.C. 523(a) 17
Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426:
29 U.S.C. 1056(d)(3) (1982 & Supp. V 1987) (98 Stat. 1433) 9
29 U.S.C. 1144(b)(7) (1982 & Supp. V 1987) (98 Stat. 1436) 9
26 U.S.C. 401(a) (1982 & Supp. V 1987) (98 Stat. 1445) 9
26 U.S.C. 401(a)(13)(A) (Supp. V 1987) 3, 8
26 U.S.C. 401(a)(13)(B) (Supp. V 1987) 3, 9
26 U.S.C. 401(b) (Supp. V (1987)) .....
26 U.S.C. 411(a) (1982 & Supp. IV 1986) 3
18 U.S.C. 664 11
26 U.S.C. 6334(a) 16
26 U.S.C. 6334(a)(6) 16, 17
26 U.S.C. 6334(c) 16
Reorg. Plan No. 4 of 1978, 3 C.F.R. 332 (1979) 9

Regulations – Continued:	Page
26 C.F.R.:	
Section 1.401(a)-13(b)(1)	9
Section 1.401(a)-13(b)(2)	16
Section 1.401(a)-13(c)(1)(i)	9
29 C.F.R. 870.51(c)	19
Miscellaneous:	
120 Cong. Rec. 29,197 (1974)	7
130 Cong. Rec. 23,481 (1984)	10
43 Fed. Reg. 6942 (1978)	16
H.R. 4473, 86th Cong., 1st Sess. (1959)	16
H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. (1974)	7, 8
H.R. Rep. No. 533, 93d Cong., 1st Sess. (1973)	13
H.R. Rep. No. 655, 98th Cong., 2d Sess. Pt. 1 (1984)	10
H.R. Rep. No. 807, 93d Cong., 2d Sess. (1974)	7
H.R. Rep. No. 1040, 90th Cong., 1st Sess. (1967)	19
1 NLRB, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959* (1959)	16
S. 1137, 86th Cong., 1st Sess. (1959)	16
Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess., *Legislative History of the Employee Retirement Income Security Act of 1974* (Comm. Print 1976):	
Vol. 2	7
Vol. 3	7
S. Rep. No. 127, 93d Cong., 1st Sess. (1973)	18
S. Rep. No. 575, 98th Cong., 2d Sess. (1984)	10

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1105

CURTIS GUIDRY, PETITIONER

v.

SHEET METAL WORKERS' NATIONAL PENSION FUND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner Curtis Guidry was formerly employed as the chief executive officer, business manager, and financial secretary-treasurer of respondent Sheet Metal Workers' International Association, Local No. 9 (the Union). He also served as a trustee of the Union's pension and welfare plans. In 1982, petitioner pleaded guilty to violating the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. 501(c), by embezzling more than $377,000 from the Union. As the Union's chief financial officer, petitioner was able to use several methods to embezzle from the Union. For example, he transferred money from the Union's checking account to his own account and also made unauthorized cash withdrawals from the Union's savings account for his personal use. In addition, he deposited into his personal account checks payable to the Union, including checks received by the Union from the

pension and welfare plans for administrative services. Petitioner was charged with, and convicted of, embezzling from the Union only; there was no allegation that he had stolen from the pension or welfare plans. Pet. App. A2-A3, B2, C8-C10; App., *infra,* 1a-2a.

After serving a prison term and resigning from his employment with the Union, petitioner applied for early retirement benefits from the three respondent pension plans. When two of the plans refused to pay, he brought this action against those two plans under 29 U.S.C. 1132(a)(1)(B), a provision of the Employee Retirement Income Security Act of 1974 (ERISA), to enforce his right to accrued and future benefits. While not disputing that petitioner was otherwise entitled to benefits, the plans contended that he had forfeited his eligibility by his misconduct. The Union intervened, joined the third pension plan as a party, and asserted six claims against petitioner. The first claim alleged breaches of petitioner's fiduciary duties to the Union in violation of Section 501(a) of the LMRDA, 29 U.S.C. 501(a), while the second through fifth claims essentially restated the first claim under various state common law theories. The sixth claim asked the court to impose a constructive trust on petitioner's pension benefits in favor of the Union, and to enjoin the plans from paying any further benefits to petitioner until the Union was made whole for its losses. Petitioner and the Union stipulated to the entry of a $275,000 judgment on the Union's first five claims, while agreeing to litigate the availability of the constructive trust remedy. The plans that had denied benefits continued to argue that petitioner had totally forfeited his right to those benefits, but asserted in the alternative that, if pension benefits were owed, the Union should receive them. Pet. App. A3, B2; App., *infra,* 3a-9a.

2. The district court held that petitioner had not forfeited his pension benefits. It relied on several cases interpreting ERISA's anti-forfeiture provision, Section 203(a), 29 U.S.C. 1053(a) (1982 & Supp. V 1987),[1] to preclude forfeiture of pen-

[1] Section 203(a) states that "[e]ach pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age." It further provides that an employee's own contributions to a plan are at all times nonforfeitable and that employers' contributions must become nonforfeitable according to a vesting schedule set out in the statute. See also 26 U.S.C. 411(a) (1982 & Supp. V 1987).

sion benefits because of employee misconduct, even where that misconduct amounted to criminal fraud against the employer.[2] However, the court imposed a constructive trust on petitioner's pension benefits, making them payable to the Union. Pet. App. B5. It held that ERISA does not bar the imposition of such a constructive trust, despite what the court described (*id.* at B3) as the "unconditional" language of the statute's anti-alienation provision for pension benefits. § 206(d)(1), 29 U.S.C. 1056(d)(1).[3] The court observed that Congress had recently enacted an exception to the anti-alienation provision for "qualified domestic relations order[s]" after courts had found an implied exception for that purpose in cases such as *AT&T* v. *Merry,* 592 F.2d 118 (2d Cir. 1979). Pet. App. B3-B4.

The district court also noted that two circuits had reached contrary conclusions on the question whether to imply an exception to the anti-alienation provision in cases involving criminal misconduct or fraud. Pet. App. B4, citing *Ellis National Bank* v. *Irving Trust Co.,* 786 F.2d 466 (2d Cir. 1986) (no exception), and *St. Paul Fire & Marine Ins. Co.* v. *Cox,* 752 F.2d 550 (11th Cir. 1985) (exception implied). However, the court did not consider this case to be entirely comparable to either *Ellis National Bank* or *St. Paul Fire & Marine* because, unlike those cases, here the "question is not whether particular state law is preempted by ERISA," but instead is "how to interpret the nonalienability provision's effect on other federal statutes." Pet. App. B4. In particular, the court believed that ERISA should be read "in pari materia" with the Labor-Management Relations

[2] Pet. App. B3, citing *Fremont* v. *McGraw-Edison Co.,* 606 F.2d 752 (7th Cir. 1979), cert. denied, 445 U.S. 951 (1980); *Winer* v. *Edison Bros. Stores Pension Plan,* 593 F.2d 307 (8th Cir. 1979); *Vink* v. *SHV N. A. Holding Corp.,* 549 F. Supp. 268 (S.D.N.Y. 1982).

[3] Section 206(d)(1) states that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." See also 26 U.S.C. 401(a)(13)(A) (1982 & Supp. V 1987).

Act of 1947 (LMRA) Tit. II, 29 U.S.C. 171 *et seq.* and the LMRDA, whose purposes are to protect workers against "corrupt practices on the part of union officers." Pet. App. B4. Considering the protective purposes of all three statutes, the court concluded that "[i]n circumstances where the viability of a union and the members' pension plans was damaged by the knavery of a union official, a narrow exception to ERISA's anti-alienation provision is appropriate." *Id.* at B5. Therefore, the court granted the constructive trust remedy sought by the Union. *Ibid.*[4]

3. The court of appeals affirmed, concluding that the district court properly used its "inherent equitable authority" to impose a constructive trust "to redress breaches of ERISA" and to recover "money embezzled by [petitioner] from the pension fund." Pet. App. A2, A4, A5. In the court's view, ERISA's anti-alienation provision is subject to an implied exception for fraud, an exception the court defined as a "narrow" one "applicable only to a trustee-beneficiary [of a pension fund] who has directly or indirectly damaged the fund through his fraudulent actions." *Id.* at A12 n.3. The court relied largely on the decisions of the District of Columbia and Eleventh Circuits in *Crawford* v. *La Boucherie Bernard, Ltd.*, 815 F.2d 117 (D.C. Cir.), cert. denied, 108 S. Ct. 328 (1987), and *St. Paul Fire & Marine*, which it described as authorizing a court to "garnish a beneficial interest in a plan to satisfy a judgment based on a breach of ERISA." Pet. App. A4. It declined to follow the holdings of the Sixth and Second Circuits in *United Metal Products Corp.* v. *National Bank*, 811 F.2d 297 (6th Cir. 1987), cert. dismissed, No. 86-1786 (Apr. 22, 1988), and *Ellis National Bank*, where the courts refused to imply a criminal misconduct exception to ERISA's anti-alienation provision.

Emphasizing both the importance of fiduciary responsibility and the broad scope of the remedies provided in ERISA's enforcement provisions, the court of appeals found "no indication

[4] Although no mention of the issue was made in the district court's opinion, the hearing transcript shows that the court believed that, by imposing a constructive trust rather than a "garnishment," it could avoid any exemption issues that might arise under the Consumer Credit Protection Act. Pet. App. C22.

in [ERISA] that the unscrupulous fiduciary is to be protected from the natural legal consequences of his or her misdeeds." Pet. App. A5. According to the court, "[w]hen [petitioner] left office after embezzling at least $370,000, the Union had only $150,000 in cash assets remaining, and the financial security of workers who relied upon the Union's pension plan was severely undermined." *Ibid.* Under these circumstances, the court concluded that imposing a constructive trust on petitioner's pension benefits "both accorded with [established] principles of trust law and was well within its discretionary power as defined by the common law and ERISA." *Id.* at A7.[5]

Finally, the court of appeals rejected petitioner's effort to exempt 75 percent of his pension benefits from garnishment under the Consumer Credit Protection Act (CCPA), 15 U.S.C. 1671 *et seq.* The court recognized that the CCPA's definitions of "earnings" and "garnishment" (15 U.S.C. 1672(a) and (c), respectively) encompass periodic pension payments subjected to a constructive trust.[6] However, it declined to reach the issue on the ground that petitioner had not filed a timely objection to the writ of garnishment as required by governing state law. Pet. App. A10-A11. The court cited *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 108 S. Ct. 2182 (1988), for the proposition that state garnishment laws are not preempted by ERISA, but did not address the question whether such laws might nevertheless be preempted by the CCPA. Pet. App. A13 n.7.

DISCUSSION

There is a clear and acknowledged conflict in the circuits as to the first question presented: whether a constructive trust may be

[5] The court also rejected petitioner's argument that a constructive trust could be imposed only on embezzled funds that could be traced back into the pension plan. Pet. App. A7-A9. That issue was not presented in the petition for a writ of certiorari.

[6] Section 1672(a) defines "earnings" to include "periodic payments pursuant to a pension or retirement program." Section 1672(c) defines "garnishment" as "any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt."

imposed on the pension benefits of an employee who has stolen from his employer. In our view, the Sixth Circuit in *United Metal Products* and the Second Circuit in *Ellis National Bank* reached the correct result by concluding that an employee's pension benefits may not be paid to his employer even in cases involving criminal misconduct, whereas the Eleventh Circuit erred by reaching the opposite conclusion in *St. Paul Fire & Marine*. On its facts, the decision below places the Tenth Circuit in agreement with the Eleventh Circuit and in opposition to the Second and Sixth Circuits because petitioner embezzled from his employer and not, as the court below appeared to think, from the pension plans. Although we believed two years ago that the lower courts could resolve this issue correctly without review by this Court,[7] we now believe that review by this Court is warranted, and we think this case is suitable for resolution of the conflict.

1. The two circuits holding that ERISA's anti-alienation provision bars the imposition of a constructive trust on an employee's pension benefits reasoned that, "[d]espite its equitable appeal, [a] 'criminal misconduct' exception * * * undermines a fundamental purpose of ERISA * * * that 'if a worker has been promised a defined pension benefit upon retirement * * * he actually receives it.' " *Ellis National Bank*, 786 F.2d at 471, quoting *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981); accord, *United Metal Products*, 811 F.2d at 300. Moreover, "whether an exception should be created is a question for legislative rather than judicial judgment." *Ibid.*; accord, *Ellis National Bank*, 786 F.2d at 472. In refusing to imply a criminal misconduct exception, both courts expressly rejected (811 F.2d at 299; 786 F.2d at 471) the earlier contrary holding of the Eleventh Circuit in *St. Paul Fire & Marine*, which permitted garnishment on the theory that accomplishing the purposes of ERISA does not require "abrogation of the equitable principle

[7] See Brief for the United States as Amicus Curiae in *United Metal Products Corp.* v. *National Bank of Detroit*, No. 86-1786 (filed Sept. 18, 1987). We are serving a copy of that brief on counsel for the parties here.

that a wrongdoer should not benefit from his misdeeds." 752 F.2d at 552.

In our view, *United Metal Products* and *Ellis National Bank* were correctly decided. To ensure that employees actually receive the pension benefits they were promised, ERISA includes detailed provisions for vesting and nonforfeitability of pension rights, "concepts * * * critical to the ERISA scheme." *Alessi*, 451 U.S. at 510. For example, Section 203(a), the anti-forfeiture provision, directs each pension plan to "provide[ ] that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age" and requires pre-retirement vesting of accrued benefits according to a prescribed schedule. Except as specifically provided by the statute itself, "an employee's rights, once vested, are not to be forfeitable for any reason." H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 271 (1974), *reprinted in* 3 Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess., *Legislative History of the Employee Retirement Income Security Act of 1974*, at 4538 (Comm. Print 1976) [hereinafter *Leg. Hist.*].

This general prohibition against forfeiture of vested pension benefits was aimed directly at outlawing so-called "bad boy" clauses that denied benefits "because the employee later went to work for a competitor, or in some other way was considered 'disloyal' to the employer." H.R. Rep. No. 93-807, 93d Cong., 2d Sess. 60 (1974), *reprinted in* 2 *Leg. Hist.* 3180; see also 120 Cong. Rec. 29,197 (1974) (remarks of Rep. Dent), *reprinted in* 3 *Leg. Hist.* 4669. The drafters therefore intended to prevent the cancellation of retirement benefits as a tool for punishing employees for real or imagined offenses against their employers, including outright theft or fraud. See *Fremont* v. *McGraw-Edison Co.*, 606 F.2d 752 (7th Cir. 1979), cert. denied, 445 U.S. 951 (1980); *Winer* v. *Edison Bros. Stores Pension Plan*, 593 F.2d 307 (8th Cir. 1979); and *Vink* v. *SHV N. A. Holding Corp.*, 549 F. Supp. 268 (S.D.N.Y. 1982). Relying on this authority, the district court below properly rejected the plans' argument that petitioner had forfeited his pension benefits by his criminal misconduct. Pet. App. B3.

Like the anti-forfeiture provision, ERISA's anti-alienation provision, Section 206(d)(1), which requires all tax-qualified pension plans to provide that benefits under the plan "may not be assigned or alienated," was included to reinforce the policy of "ensur[ing] that the employee's accrued benefits are actually available for retirement purposes." H.R. Rep. No. 807, *supra*, at 68, *reprinted in* 2 *Leg. Hist.* 3188. The legislative history confirms the unsurprising conclusion that garnishments are to be viewed as involuntary assignments, and thus do not come within a limited statutory exception to the anti-alienation provision for certain voluntary assignments.[8]

ERISA further safeguards pension benefits by directing that "the assets of a plan shall never inure to the benefit of any employer" (29 U.S.C. 1103(c)(1)) and "shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan" (29 U.S.C. 1104(a)(1)(A)). To achieve those ends, the statute imposes strict fiduciary duties on plan trustees and prohibits entire categories of financial transactions between plans and parties in interest, defined to include both employers and unions. 29 U.S.C. 1002(14)(C) and (D), 1106. As this Court has emphasized, the purpose of these ERISA provisions is "specifically [to] insulate the trust from the employer's interest." *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 333 (1981). Similarly, the purpose of the trust requirement for union-sponsored welfare and pension plans, which is contained in Section 302(c)(5) of the LMRA, 29 U.S.C. 186(c)(5), is to insulate such plans from excessive control by unions. *Amax Coal*, 453 U.S. at 328-329. Under all of those statutory provisions, plan

[8] The anti-alienation provision exempts from its prohibition voluntary and revocable assignments that do not exceed ten percent of any benefit payment, as well as loans from a plan to its participants and beneficiaries that are secured by the participant's nonforfeitable benefits. 26 U.S.C. 401(a)(13)(A) (1982 & Supp. V 1987); 29 U.S.C. 1056(d)(2). The Conference Report notes that "[f]or purposes of this rule, a garnishment or levy is not be considered a voluntary assignment." H.R. Rep. No. 1280, *supra*, at 280, *reprinted in* 3 *Leg. Hist.* 4547.

assets may be used only for plan purposes, not to further the interests of such related parties as employers and unions.

Consistent with the statutory language and the legislative history, a regulation promulgated by the Treasury Department in 1978 interprets the anti-alienation provision in a manner that clearly prohibits the constructive trust imposed in this case.[9] That regulation states that "benefits provided under [a qualified] plan may not be anticipated, assigned (either at law or in equity), alienated or subject to attachment, garnishment, levy, execution or other legal or equitable process." 26 C.F.R. 1.401(a)-13(b)(1). It further defines a prohibited "assignment" or "alienation" to include "*[a]ny* arrangement providing for the payment *to the employer* of plan benefits which otherwise would be due the participant under the plan." 26 C.F.R. 1.401(a)-13(c)(1)(i) (emphasis added). The constructive trust utilized here is precisely the type of "other * * * equitable process * * * providing for the payment to the employer of plan benefits" that is barred by the Treasury regulation.

Since it enacted ERISA in 1974, Congress has added only one exception to ERISA's anti-alienation provision, the limited exception for "qualified domestic relations orders" contained in the Retirement Equity Act of 1984, Pub. L. No. 98-397, §§ 104(a), 104(b), 204(a), 98 Stat. 1433, 1436, 1445 (codified at 29 U.S.C. 1056(d)(3), 1144(b)(7) (1982 & Supp. V 1987), 26 U.S.C. 401(a)(13)(B) (1982 & Supp. V 1987)). That amendment was in response to a series of cases in which the courts had recognized an implied exception to the anti-alienation provision to permit garnishment of pension benefits to satisfy spousal and

[9] All rulemaking and interpretive authority with respect to ERISA's minimum funding, participation, and vesting standards for employee benefit plans is consolidated in the Secretary of the Treasury (in practice, the Internal Revenue Service (IRS)). Reorg. Plan No. 4 of 1978, § 101(a), 3 C.F.R. 332 (1979). The Secretary of Labor, however, retains authority under Section 502 of ERISA, 29 U.S.C. 1132 (1982 & Supp. V 1987), to bring civil actions to enforce fiduciary obligations under such plans consistent with the IRS's interpretation of those standards. Reorg. Plan No. 4 of 1978, § 104, 3 C.F.R. 333 (1979). Thus, both agencies have responsibility for enforcement of the anti-alienation provision.

child support and community property obligations contained in the orders of state domestic relations courts. S. Rep. No. 575, 98th Cong., 2d Sess. 18-19 (1984). In "carving out an appropriate and well-defined exception for domestic relations orders meeting specific standards" (130 Cong. Rec. 23,481 (1984) (remarks of Rep. Erlenborn)), Congress reaffirmed its intent to make no other changes in the anti-alienation or preemption provisions of ERISA. *Ibid.*; see also H.R. Rep. No. 655, 98th Cong., 2d Sess. Pt. 1, at 39, 42 (1984).

Moreover, the overwhelming majority of courts have held that ERISA precludes garnishment by general creditors of pension plan participants, a proposition whose validity was assumed by this Court in *Mackey*, 108 S. Ct. at 2188-2189.[10] Those courts reasoned that the anti-alienation provision is designed to insulate pension plan benefits from garnishment so that plan participants and their dependents will actually receive their pension benefits. In our view, and that of the Second and Sixth Circuits, nothing in the language or legislative history of ERISA places an employer harmed by an employee's embezzlement in any better position than that of any other third-party creditor attempting to collect a debt by garnishing a plan account.[11] In both instances, the message of ERISA's anti-alienation provision is that creditors cannot invade a debtor's promised pension benefits.

2. Respondents contend that review of the first question presented is not warranted for three reasons. First, they argue (Br. in Opp. 6-9) that this case does not present an opportunity

[10] See, *e.g.*, *Tenneco Inc.* v. *First Virginia Bank*, 698 F.2d 688, 689-690 (4th Cir. 1983); *General Motors Corp.* v. *Buha*, 623 F.2d 455, 460-463 (6th Cir. 1980); *Commercial Mortgage Ins., Inc.* v. *Citizens Nat. Bank*, 526 F. Supp. 510, 516-520 (N.D. Tex. 1981); *Christ Hospital* v. *Greenwald*, 82 Ill. App. 3d 1024, 1027-1028, 403 N.E.2d 700, 703 (1980); *Helmsley-Spear, Inc.* v. *Winter*, 74 A.D.2d 195, 199, 426 N.Y.S.2d 778, 781 (1980), aff'd, 52 N.Y.2d 984, 419 N.E.2d 1078, 438 N.Y.S.2d 79 (1981).

[11] Neither employers nor other creditors, of course, can claim the same equitable interest in pension benefits as can a participant's spouse and children, who are part of the class of persons ERISA was designed to protect. See, *e.g.*, *Ellis National Bank*, 786 F.2d at 470-471, and cases discussed therein.

to resolve the conflict in the circuits because it is more like *Crawford* v. *La Boucherie Bernard, Ltd.*, 815 F.2d 117 (D.C. Cir. 1987), cert. denied, 108 S. Ct. 735 (1988), where a fiduciary of an employee benefit plan embezzled from the plan itself, than it is to the cases where an employee embezzled from his employer. Second, they contend (Br. in Opp. 9) that this case is unique, and hence unsuitable for review, because it involves a violation of Section 501 of the LMRDA. Third, they suggest (Br. in Opp. 9-10) that, because petitioner failed to object to the Union's garnishment action as required by state law, he should be precluded from raising the argument that ERISA's anti-alienation provision bars the imposition of a constructive trust on his pension benefits. All three contentions should be rejected.

a. The court of appeals misunderstood the relevant facts. It repeatedly mischaracterized petitioner's misconduct as embezzling "from the pension fund" (see, *e.g.*, Pet. App. A2) and described the use of a constructive trust as "redress[ing] breaches of ERISA" (*id.* at A5; see also *id.* at A6, A7, A9, A11 n.3, A13 n.7). In fact, petitioner was neither prosecuted for embezzlement from an ERISA-covered pension plan (see 18 U.S.C. 664) nor subjected to a civil suit under ERISA in his capacity as a plan trustee for any breaches of his ERISA fiduciary duties (see 29 U.S.C. (1982 & Supp. V 1987) 1104, 1106, 1132). Indeed, none of the plans involved in this litigation suffered any actual losses as a result of petitioner's actions.[12] Instead, petitioner was prosecuted for—and pleaded guilty to—a criminal violation of the LMRDA for embezzlement from the Union (29 U.S.C. 501(c); Pet. App. B2; App., *infra*, 1-2). More important, the Union obtained the civil judgment debt that it seeks to enforce through the constructive trust in an LMRDA

[12] Part of the $377,000 petitioner admitted to embezzling from the Union originated from the employee benefit plans, as payments from the plans to the Union for administrative services the Union had provided. But when petitioner converted this money to his personal use, it had already been paid to the Union and belonged to the Union. The parties agreed that the plans suffered no losses as a result of petitioner's embezzlement. Pet. App. C10, C13.

action against petitioner for breaching his fiduciary duties as a union officer. Pet. App. B2. Hence, the constructive trust was imposed to remedy a breach of the LMRDA rather than ERISA, as erroneously assumed by the Tenth Circuit, since petitioner embezzled from the Union, not the plans.

The court of appeals also misconceived relevant law. The court characterized *United Metal Products, Ellis National Bank,* and *St. Paul Fire & Marine* as involving instances where a trustee of a pension plan, who was also a plan participant, damaged the pension plan through his fraudulent actions. See Pet. App. A12 n.3. As a result, the court analyzed this case primarily by reference to the broad and flexible trust law remedies incorporated by ERISA to redress fiduciary misconduct against employee benefit plans. In fact, however, none of those three cases involved ERISA fiduciary misconduct against pension plans. Instead, like this case, each of those cases involved an employee who stole from his or her employer.[13] Accordingly, the result here is in accord with the decision in *St. Paul Fire & Marine,* and in conflict with the results in *United Metal Products* and *Ellis National Bank*.

Contrary to respondents' view (Br. in Opp. 7-9), this case is not comparable to *Crawford.* In that case, the trustees of a pension plan were found to have breached their ERISA-mandated fiduciary duties by misusing plan assets in various ways, costing the plan nearly $1 million. The District of Columbia Circuit held that ERISA "authorizes a court to offset a party's interest in a plan covered by that statute against a judgment based on the party's breaches of duty to the same plan." 815 F.2d at

[13] In *United Metal Products,* the company sought to garnish the pension account of a bookkeeper who had embezzled nearly half a million dollars from it and was believed to be residing in Brazil. 811 F.2d at 298 & n.1. In *Ellis National Bank,* Prudential-Bache sought to garnish the pension account of a former officer who had pleaded guilty to grand theft and securities fraud in connection with unauthorized transactions in customers' accounts. 786 F.2d at 467. In *St. Paul Fire & Marine,* a bank's insurer sought to garnish the pension account of the bank's former president, who had been convicted of misapplying bank funds. 752 F.2d at 551.

118.[14] In affording this remedy to the plan itself, *Crawford* by no means carved out a general criminal misconduct exception to ERISA's anti-alienation provision for the benefit of employers, unions, or other third-party creditors. *Crawford* thus provides no authority for the result in this case.

Nor is there any evidence that Congress intended to permit any general criminal misconduct exception to ERISA's anti-alienation provision for pension benefits.[15] Instead, barring the diversion of pension benefits to accomplish other societal goals is fully consistent with the language of the statute and congressional intent. ERISA was enacted primarily for "the protection of individual pension rights." H.R. Rep. No. 533, 93d Cong., 1st Sess. 1 (1973), *reprinted in* 2 *Leg. Hist.* 2348. Indeed, Congress's considered judgment was that the economic security of retirees—and their dependents—was paramount, even against other worthy objectives. The whole point of a provision barring involuntary alienation is to prevent third parties with legitimate claims against a person from collecting out of the pension assets protected by the provision. Consequently, contrary to the court's belief (Pet. App. A5), Congress did intend in the anti-alienation provision "to protect[ ] individuals such as [petitioner] from the consequences of their misconduct."[16] See

[14] The correctness of the holding in *Crawford* need not be decided here since this case does not involve an ERISA breach or remedy. However, the Secretary of Labor, a party in *Crawford,* supported the offset remedy there on the ground that ERISA authorizes broad remedies to counter breaches of fiduciary duty by trustees of employee benefit plans. See 29 U.S.C. 1109, 1132(a)(2).

[15] The confidence of the court below (see Pet. App. A5, A12 n.3) that a "narrow," "easily defined" exception to the anti-alienation provision can be carved out for fraudulent actions that "directly or indirectly" damage a pension plan is misplaced. Such an exception could encompass virtually any crime against an employer or union plan sponsor that might have ripple effects on the plan, *e.g.*, by reducing the level of future contributions by the sponsor. As several courts have observed, delineating the scope of such an exception would likely require a "boundless stream of suits and disputes." *Vink,* 549 F. Supp. at 273; see also *United Metal Products,* 811 F.2d at 300; *Ellis National Bank*, 786 F.2d at 471.

[16] Congress also intended to protect employees' dependents, who ordinarily

Crausman v. *Curtis-Wright Corp.*, 676 F. Supp. 1302, 1304 (D.N.J. 1988) ("Congress did not intend to include or permit an employee misconduct exception").

In sum, this case is similar in all its material facts to *United Metal Products, Ellis National Bank,* and *St. Paul Fire & Marine,* where employers sought to garnish a former employee's pension plan benefits to recover a loss resulting from the employee's embezzlement or fraud against the employer. For purposes of the anti-alienation provision, it is immaterial that a union, rather than a corporation, happened to be petitioner's employer as well as a sponsor of and contributor to the pension plans. ERISA's strict fiduciary duties ensure that a plan's assets cannot be diverted to either a sponsoring employer or union. Since ERISA's anti-alienation provision is designed to preserve pension benefits solely for the use of retirees and their dependents, diversion of those benefits to any other entity is equally contrary to the statutory purpose.

Accordingly, this case presents an opportunity to resolve the conflict in the circuits. Moreover, we have come to the view that authoritative guidance is needed in this area. Two years ago, we believed that additional circuits would embrace *Ellis National Bank* and *United Metal Products* and would reject the *St. Paul Fire & Marine* decision, which we consider clearly wrong. See Brief for the United States as Amicus Curiae at 12-13 in *United Metal Products* v. *National Bank of Detroit, supra.* But the Tenth Circuit in this case not only preferred the result in *St. Paul Fire & Marine* over the result in *Ellis National Bank* and *United Metal Products,* but also so mischaracterized those cases as to spawn further confusion in the area.[17] We now believe that this confusion can be eliminated only by review by this Court.

---

bear no responsibility for the employee's misconduct. 29 U.S.C. 1001(a); *Vink,* 549 F. Supp. at 271.

[17] Moreover, additional uncertainty is created by the reference of the court below to direct "*or indirect*[ ]" damage to a covered plan as a basis for an exception to the anti-alienation provision (*e.g.*, Pet. App. A12 n.3 (emphasis added)). See note 15, *supra.*

b. Respondents also contend (Br. in Opp. 9) that this case is unsuitable for review because the judgment debt arose under the LMRDA. As respondents correctly observe, this case differs from the three earlier employer garnishment cases in that the judgment debt arose under a federal, not a state, law. Since ERISA preserves all other laws of the United States (29 U.S.C. 1144(d);[18] see *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 100-101 (1983)), it is necessary to consider whether anything in the LMRDA should be construed as authorizing the attachment of an unfaithful union officer's pension benefits, despite the strong policy concerns behind ERISA's anti-alienation provision. This question is not without difficulty. Nonetheless, in our view the fact that this case arises under the LMRDA should not affect the result here.

The LMRDA was designed to protect union members and other employees by establishing "high standards of responsibility and ethical conduct" for union officials. 29 U.S.C. 401(b) (Supp. V 1987). Accordingly, Section 501(a) of that Act declares that officers of a labor organization "occupy positions of trust in relation to such organization and its members as a group" and therefore have a duty "to hold its money and property solely for the benefit of the organization and its members." 29 U.S.C. 501(a). These fiduciary duties are enforceable through a private right of action by the union or any of its members "to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization." 29 U.S.C. 501(b). A separate criminal provision forbids embezzlement from a union. 29 U.S.C. 501(c).

Although the Tenth Circuit did not specifically refer to Section 501(b) of the LMRDA as a basis for its imposition of a constructive trust, that Section's authorization of "other appropriate relief" is a possible statutory source – indeed the only possible source – for such a remedy in this case. The courts have

---

[18] Section 514(d) of ERISA, 29 U.S.C. 1144(d), provides that "[n]othing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(c) of this title) or any rule or regulation issued under any such law."

read Section 501(b) to authorize "a wide array of remedies for fiduciary breaches," including damages, accounting, injunctions, surcharge, and restitution. *Morrissey* v. *Curran*, 650 F.2d 1267, 1281 (2d Cir. 1981).[19] In particular, two courts of appeals have enjoined unions from paying the salaries of culpable union officers until those officers satisfied their judgment debts to the unions for violating the LMRDA. *Local 92, Int'l Ass'n of Bridge Workers* v. *Norris*, 383 F.2d 735 (5th Cir. 1967); *Highway Truck Drivers & Helpers* v. *Cohen*, 334 F.2d 378 (3d Cir.), cert. denied, 379 U.S. 921 (1964). The latter court explained its action as " 'merely an injunction in aid of a judgment creditor to set off claims owed it by the judgment debtor.' " *Id.* at 381 (citation omitted).

Nonetheless, neither the statutory language, the legislative history, nor any case under Section 501 of the LMRDA of which we are aware specifically authorizes imposition of a constructive trust on the pension benefits of a union officer to recover the officer's judgment debt to a union.[20] Such a remedy

[19] Earlier versions of Section 501(b) specifically listed injunctions and restitution among the available remedies, and there is no indication that Congress intended to exclude them by substituting the catch-all "other appropriate relief." See H.R. 4473, 86th Cong., 1st Sess. § 201(b) (1959), *reprinted in* 1 NLRB, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, at 218-219 (1959); S. 1137, 86th Cong., 1st Sess. § 403(a) (1959), *reprinted in* 1 NLRB, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, at 308 (1959).

[20] This lack of specific statutory authority distinguishes collection of LMRDA judgment debts from collection of federal taxes, which is permitted by the same Treasury regulation that bars most other attachments or alienations of pension benefits. 26 C.F.R. 1.401(a)-13(b)(2). As the Internal Revenue Service explained in promulgating the regulation (43 Fed. Reg. 6942 (1978)), that exception to the general rule prohibiting garnishment of pension plans is based both on ERISA's savings clause for other federal laws, 29 U.S.C. 1144(d), and on language in the Internal Revenue Code that overrides other federal statutes. Specifically, 26 U.S.C. 6334(c) provides that "[n]otwithstanding any other law of the United States, no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a)." Section 6334(a), in turn, contains ten exemptions, including an exemption for pension payments to railroad employees and military personnel (§ 6334(a)(6)), but contains no general exemption for pension funds. It is, therefore, clear that Congress intended pension plan accounts other than those listed in Section 6334(a)(6) to be subject to federal tax levies.

is not simply an offset between a judgment creditor and a judgment debtor, as in the two LMRDA cases cited above (*Local 92* and *Highway Truck Drivers*). Instead, the constructive trust more closely resembles a third-party garnishment, where the pension plan, an outsider to the LMRDA dispute, is asked to divert payments from its intended beneficiary to the union.

While such a result would undoubtedly further the general protective purposes of the LMRDA, it would just as clearly undermine the more specific protective purpose of ERISA's anti-alienation provision. Thus it is especially significant that the drafters of the LMRDA carefully specified their intent to preserve union members' rights under other federal laws from defeasance by the LMRDA. Section 603(a) of the LMRDA, 29 U.S.C. 523(a), states that "[e]xcept as explicitly provided to the contrary, nothing in this chapter shall * * * take away any right * * * to which members of a labor organization are entitled under * * * other Federal law." Here petitioner was a union member with a right to pension benefits protected by ERISA,[21] another federal law; and, as stated, nothing in the LMRDA "explicitly provide[s]" that his pension benefits are subject to attachment by the Union. Moreover, petitioner's substantive right is firmly grounded in specific statutory language under ERISA—its anti-alienation provision—while the Union's claim to a constructive trust is grounded at best on general equitable principles implied from the LMRDA's catch-all authorization of "other appropriate relief" in Section 501(b). In contrast to the precise focus of the LMRDA savings clause on individual rights, the ERISA savings clause for other federal laws is general in nature. Reading all four of these provisions together in accordance with sound principles of statutory construction, the specific should control the general, so that petitioner's right to receive his pension benefits is preserved. See *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 153 (1976); *Morton* v. *Mancari*, 417 U.S. 535, 550-551 (1974).

[21] We do not read Section 603(a) of the LMRDA as referring only to those federal rights to which union members are entitled *qua* union members.

Further tipping the scales in favor of ERISA is that statute's history. The Congress that enacted ERISA was well aware of the existence (and limitations) of the LMRDA and other federal labor statutes then regulating various aspects of pension and welfare plans. See S. Rep. No. 127, 93d Cong., 1st Sess. 3 (1973), *reprinted in* 1 *Leg. Hist.* 589. Had it wished, Congress could have created exceptions to ERISA's anti-alienation and anti-forfeiture provisions to permit garnishment of pension benefits to satisfy LMRDA judgment debts. However, Congress did not do so, and nothing in ERISA (or its legislative history) suggests that it would approve the judicial gloss added to the anti-alienation provision by the court of appeals. To the contrary, Congress especially intended to insulate pension benefits from interference by all employers. *Amax Coal,* 453 U.S. at 333. On balance, then, we believe the better view of the two federal statutes is that ERISA's anti-alienation provision precludes the use of pension benefits to satisfy an LRMDA judgment debt. Thus the fact that this case involves embezzlement by a union official does not militate against review.

c. Nor is review of the first question inappropriate because petitioner failed to object to the garnishment of his pension account in accordance with state law. The court below held (Pet. App. A10-A11) that petitioner's failure to follow state law precluded presentation of his claim for a 75 percent exemption from garnishment under the Consumer Credit Protection Act, 15 U.S.C. 1671 *et seq.* Respondent urges (Br. in Opp. 9-10) that in view of this holding, petitioner's failure to follow state law should also bar presentation of his claim for a "100% exemption under ERISA's anti-alienation provision."

This contention is frivolous. Whatever the correctness of the holding of the court below with respect to the CCPA (see point 3, *infra*), no court has ever held that state law need be followed in claiming a right to plan benefits under the anti-alienation provision of ERISA. Nor could such a holding be reconciled with the clear language and purpose of that provision.

3. The second question presented by the petition is whether the court below was correct in holding that failure to conform

to state law barred presentation of the claim for 75 percent exemption under the CCPA. Although we believe the court below reached an erroneous conclusion on this issue, we do not believe the question is one that warrants review in the circumstances of this case.

a. The restrictions on garnishment in the CCPA were adopted to protect individual debtors from predatory extensions of credit, loss of employment, and personal bankruptcy. 15 U.S.C. 1671(a). The statute generally limits garnishment to 25 percent of the debtor's weekly disposable earnings. 15 U.S.C. 1673(a). "Earnings" are defined to include "periodic payments pursuant to a pension or retirement program" (15 U.S.C. 1672(a)) and "garnishment" is defined broadly as "any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt." 15 U.S.C. 1672(c). The restrictions on garnishment are phrased as limitations on the power of the court: "No court of the United States or any State * * * may make, execute, or enforce any order or process in violation of this section." 15 U.S.C. 1673(c). The Secretary of Labor is empowered to enforce the CCPA garnishment provisions (15 U.S.C. 1676), and the federal statute preempts state laws that provide less protection to debtors. 15 U.S.C. 1677; see generally H.R. Rep. No. 1040, 90th Cong., 1st Sess. (1967); *First National Bank* v. *Columbia Credit Corp.*, 179 Colo. 242, 499 P.2d 1163 (1972).

The Secretary of Labor has interpreted the statutory provisions in 15 U.S.C. 1673(a) and (c) as "not requiring the raising of the subsection (a) restrictions [the percentage exemptions] as affirmative defenses in garnishment proceedings." 29 C.F.R. 870.51(c). This construction of the statute has been given deference by most courts, which have held that the percentage limitations in Section 1673(a) are "self-executing," and thus need not be timely and personally demanded by the debtor under state law or pain of waiver. *Donovan* v. *Hamilton County Municipal Court,* 580 F. Supp. 554, 557 (S.D. Ohio 1984); see also *Hodgson* v. *Cleveland Municipal Court,* 326 F. Supp. 419, 431 (N.D. Ohio 1971); *First National Bank* v. *Columbia Credit*

Corp., 179 Colo. at 251-252, 499 P.2d at 1168 (deferring to Secretary of Labor's regulations on garnishment); but see *Lutes* v. *Lutes*, 722 S.W.2d 314, 318-319 (Mo. Ct. App. 1986) (CCPA exemptions not self-executing but can be waived). The decision below, holding petitioner bound by the procedural requirements of Colorado garnishment law (Pet. App. A10-A11), thus directly contravenes Section 1673(c) of the CCPA, as interpreted by the Secretary of Labor and prior federal court decisions. Apparently the courts and the parties below simply overlooked these authoritative interpretations of the preemptive effect and operation of the CCPA's garnishment exemptions, and thus the court erroneously dismissed petitioner's CCPA claims.

b. Because the relevant provisions of the CCPA were not called to the attention of the court below, we do not think the second question presented, on which there is no conflict in the circuits (no other court of appeals having addressed it), warrants review by this Court. And, in any event, the second question would not be reached if the Court holds that ERISA's anti-alienation provision bars the imposition of a constructive trust on pension benefits.

CONCLUSION

The petition a writ of for certiorari should be granted, limited to the first question presented.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

DAVID L. SHAPIRO
Deputy Solicitor General

CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General

JERRY G. THORN
Acting Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

MARY-HELEN MAUTNER
Counsel for Appellate Litigation

ELLEN L. BEARD
Attorney
Department of Labor

JUNE 1989

APPENDIX A

STATEMENT OF THE UNITED STATES ATTORNEY TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

In re: United States v. CURTIS GUIDRY
Statute: 29 U.S.C. § 501(c)
Penalty: NMT $10,000; NMT 5 years; or both plus the costs of prosecution
Plea Agreement: If Mr. GUIDRY enters a plea of guilty to Count 1 of the Information, the government will agree that no further criminal charges will be brought against him for embezzlement from the Sheet Metal Workers Local Union #9.

PROSECUTOR'S STATEMENT

Sheet Metal Workers Local #9 is a labor union with 1,550 members throughout the State of Colorado employed in the sheet metal trade at construction sites and in industrial plants. The union is a labor organization involved in collective bargaining relationships with approximately 85 employers. Local #9 derives most of its revenue from dues and fees paid by its members. CURTIS GUIDRY was the Business Manager and Financial Secretary of Local #9 from 1961 until September 30, 1981. He was the chief financial officer of the Union and was responsible for conducting the day to day business of the union. He was authorized to sign checks on the Union's checking account and had signature authority on the Union's savings accounts.

During the period of time between April 1, 1977, and September 30, 1981 GUIDRY embezzled a total of $377,301.53 from the Sheet Metal Workers Local Union #9. The funds were embezzled in the following five different methods:

1. GUIDRY signed thirty-six checks totalling $119,509.90 written on the Labor Union's account at Central Bank and Trust and deposited this money in his personal account at the same bank.

2. GUIDRY made eight unauthorized cash withdrawals totalling $27,600 from the Union's savings account at Western National Bank and converted the money to personal use.

3. GUIDRY deposited a $2,000 check from JMR Leasing payable to the Labor Union into his personal account and converted the funds without authorization for personal use.

4. GUIDRY signed on behalf of the Labor Union seventeen Labor Union checks totalling $144,568.25 on the Union Welfare Fund account and deposited them in his personal account without authorization and for personal use.

5. GUIDRY, acting as the Financial Secretary of the Labor Union, deposited thirteen Pension Fund checks payable to Labor Union #9 for administrative services into his account for unauthorized personal use. These checks totalled $83,623.38.

APPENDIX B

COMPLAINT FILED BY SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 9

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 84-M-879

CURTIS GUIDRY, PLAINTIFF

v.

SHEET METAL WORKERS NATIONAL PENSION FUND, ET AL.,
DEFENDANTS,

AND

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION,
LOCAL NO. 9, INTERVENOR

AND

SHEET METAL WORKERS LOCAL NO. 9 PENSION FUND,
Party under Rule 19 F.R.C.P.

[Filed: Aug. 7, 1985]

COMPLAINT BY INTERVENOR

COMES NOW Intervenor, Sheet Metal Workers International Association, Local No. 9, and states the following claims pursuant to Rule 24(c) F.R.C.P.:

I.

JURISDICTION

1. This Court would have independent jurisdiction over Intervenor's claim pursuant to 29 U.S.C. § 501(b) and 28 U.S.C. § 1331. In any event, the Court's jurisdiction derives from its jurisdiction over the original action.

II.

NEW PARTIES

2. Sheet Metal Workers International Association, Local No. 9 (hereinafter Intervenor) is an unincorporated association operating in the State of Colorado and is a labor organization within the meaning of the National Labor Relations Act, 29 U.S.C. § 152(5).

3. The Sheet Metal Workers Local No. 9 Pension Fund is a joint labor management trust fund organized pursuant to Section 302(c) of the National Labor Relations Act (29 U.S.C. § 186(c)) for the purpose of providing retirement benefits for members of Sheet Metal Workers International Association, Local No. 9.

III.

FACTUAL BACKGROUND

4. Between 1964 and September 30, 1981, Curtis Guidry was chief executive officer of Intervenor. At pertinent times during this period, he held the title of business manager and financial secretary-treasurer of the Intervenor.

5. During the period between approximately 1964 and September 30, 1981, Plaintiff Guidry either singly or in concert with the bookkeeper for the union, one Agnes Short, committed various acts which were either designed to deprive or had the result of depriving the Intervenor of money which rightfully belonged to the Intervenor. As chief executive officer of the local union, Plaintiff either converted this money and property to his

own use or knew of similar acts being committed by bookkeeper Agnes Short and did nothing to curtail them.

6. In an audit performed by Arthur Young & Company at the request of Intervenor, Arthur Young & Company concluded that from January, 1970 through September, 1981 a total of $998,281 had been stolen from Intervenor. Much of that money has not been recovered by Intervenor, and Intervenor has incurred substantial costs in collecting the money that it has recovered. A copy of the audit report is attached hereto and incorporated herein, which specifies the amounts stolen by Mr. Guidry and the methods utilized to steal during the stated period.

7. Upon information and belief, the Plaintiff deprived the Intervenor of property and money which rightfully belonged to the Intervenor prior to January, 1970 in amounts unknown at the present time.

8. The Plaintiff concealed from the union all of the above misappropriations of funds, both by misrepresentation and by failure to disclose.

9. The actions of Plaintiff more fully set forth above have caused the union to incur special costs which they would not otherwise have incurred, including but not limited to costs for audits, retrieval of records, attorneys' fees and travel expenses.

10. On March 31, 1982, before Honorable Zita L. Weinshienk, Judge of the United States District Court for the District of Colorado, Plaintiff pled guilty to one count in violation of 29 U.S.C. § 501(c). In that guilty plea, Plaintiff confessed to embezzling, stealing and unlawfully and willfully abstracting and converting to his own use $377,301.53 from the general account of the Intervenor between April 1, 1977 and September 30, 1981. Thereafter, Plaintiff was sentenced to serve the maximum sentence for his conviction by Judge Weinshienk.

11. At various times during Plaintiff's tenure as chief executive officer of the Intervenor, Intervenor made contributions in his behalf to three pension funds, the Sheet Metal Workers Local No. 9 Pension Fund, the Sheet Metal Workers National Pension Fund and the Sheet Metal Workers Local Unions and

Councils Pension Plan (hereinafter referred to collectively as the Pension Funds).

12. Subsequent to discovery of his fraudulent activities, Plaintiff applied to all three Pension Funds for early retirement benefits.

13. The Sheet Metal Workers National Pension Fund and the Sheet Metal Workers Local Unions and Councils Pension Plan have refused to pay Plaintiff early retirement benefits resulting in Plaintiff's initiation of this action.

14. However, Sheet Metal Workers Local No. 9 Pension Fund began paying Plaintiff his early retirement benefits effective July 1, 1985. Said benefits amount to $645 per month.

IV.

FIRST CLAIM FOR RELIEF

15. Intervenor incorporates in this first claim paragraph 1-14 above as if fully set forth.

16. This first claim for relief is asserted against Plaintiff Curtis Guidry.

17. By virtue of the holding of the offices in the union Intervenor referred to above, Plaintiff Guidry occupied a position of fiduciary responsibility toward the union and the union's members with respect to their money and property under 29 U.S.C. § 501.

18. Plaintiff Guidry has breached said fiduciary responsibility in ways, including but not limited to the following:

a. Failing to hold the money and property of Intervenor solely for the benefit of the organization and its members;

b. Failing to manage, invest and expend the same in accordance with the Constitution and Bylaws of the Intervenor and any resolutions of the governing bodies adopted thereunder;

c. Dealing with Intervenor as an adverse party;

d. Failing to account to the Intervenor for profits received by Plaintiff in his embezzlements; and

e. Failing to disclose to the union embezzlements and conversions commited by others.

19. In committing the above acts, Plaintiff Guidry violated his fiduciary duties imposed by 29 U.S.C. § 501(a).

V.

SECOND CLAIM FOR RELIEF

20. Intervenor incorporates in this second claim paragraphs 1-19 above as if fully set forth.

21. This second claim for relief is asserted against Plaintiff Curtis Guidry.

22. By the acts alleged above, Plaintiff Guidry converted the property of the Intervenor in that he did exercise unauthorized acts of dominion and control over the personal property of the Intervenor.

VI.

THIRD CLAIM FOR RELIEF

23. Intervenor incorporates in his third claim for relief paragraphs 1-22 above as if fully set forth.

24. This third claim for relief is asserted against Plaintiff Curtis Guidry.

25. Plaintiff Guidry committed actual fraud against the Intervenor by the acts set forth above in that those acts constituted a knowing concealment of material facts by Guidry made with intent to deceive Intervenor and to cause reliance thereon, and the Intervenor did reasonably rely upon said misrepresentations.

VII.

FOURTH CLAIM FOR RELIEF

26. Intervenor incorporates paragraphs 1-25 in this fourth claim for relief as if fully set forth.

27. This fourth claim for relief is asserted against Plaintiff Curtis Guidry.

28. Plaintiff Guidry is liable to the union for monies had and received in that Guidry received money which in good conscience and equity should be paid to the union.

VIII.

FIFTH CLAIM FOR RELIEF

29. Intervenor incorporates paragraphs 1-28 in this fifth claim for relief as if fully set forth.

30. This fifth claim for relief is asserted against Plaintiff Curtis Guidry.

31. Plaintiff Curtis Guidry was negligent in that he had a duty of reasonable care toward the union and did fail to exercise that care and to act as a reasonable person would have to uncover the acts of conversion and fraud which were committed against the union.

IX.

SIXTH CLAIM FOR RELIEF

32. Intervenor incorporates paragraphs 1-31 above into this sixth claim for relief as if fully set forth.

33. This sixth claim for relief is asserted against Defendants Sheet Metal Workers National Pension Fund and Sheet Metal Workers Local Unions and Councils Pension Plan and furthermore is asserted against the Sheet Metal Workers Local No. 9 Pension Plan which Intervenor has moved to join as a party in this action pursuant to Rule 19 F.R.C.P. Additionally, this claim for relief is asserted against Plaintiff Curtis Guicry.

34. Plaintiff Guidry has made application to the Pension Funds for his pension benefits. In equity, said benefits should be paid to Intervenor or should be held in trust for Plaintiff Guidry until Intervenor has been made whole for all losses resulting from the acts of Guidry as alleged above.

35. In the exercise of its equitable powers, this Court must restrain and enjoin the Pension Funds from paying any further pension benefits to Plaintiff Guidry until the completion of this action and thereafter until Intervenor is made whole for its losses. Unless this Court exercises those powers, Intervenor will be irreparably harmed.

WHEREFORE, Intervenor prays for the following:

1. Judgment for damages against Plaintiff Guidry in an amount to be proven at trial;

2. An order requiring Defendant Guidry to pay to Intervenor all monies had and received which should, under equitable principles, have been paid to the union;

3. An order from the Court requiring Defendant Guidry to make an accounting in accordance with 29 U.S.C. § 501(a) with respect to the money and property which he wrongfully and in breach of his fiduciary duty converted to his gain;

4. A temporary and permanent injunction against the Pension Funds prohibiting those Funds from making any further payments of pension benefits to Plaintiff Guidry unless and until Plaintiff Guidry makes the Intervenor whole for its losses;

5. Interest at the statutory maximum rate; and

6. Such other and further relief as this Court deems just and proper.

Respectfully submitted,

BRAUER & BUESCHER, P.C.

By: Joseph M. Goldhammer

JOSEPH M. GOLDHAMMER, #5761
Attorneys for Defendant and Intervenor
1563 Gaylord Street
Denver, CO 80206
Telephone: (303) 333-7751

U.S. GOVERNMENT PRINTING OFFICE 1984 - 241 059 (072.9

SUPPLEMENTAL BRIEF

No. 88-1105

(4)

Supreme Court, U.S.
FILED
JUN 15 1989
SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CURTIS GUIDRY,

Petitioner,

v.

SHEET METAL WORKERS NATIONAL PENSION FUND;
SHEET METAL WORKERS LOCAL UNIONS AND
COUNCILS PENSION PLAN;
SHEET METAL WORKERS INTERNATIONAL
ASSOCIATION, LOCAL 9;
SHEET METAL WORKERS LOCAL NO. 9
PENSION FUND, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

SUPPLEMENTAL BRIEF IN OPPOSITION

WALTER C. BRAUER III
BRAUER & BUESCHER, P.C.
1563 Gaylord
Denver, CO 80206
(303) 333-7751
(Counsel of Record)

RAYMOND J. SWEENEY
1898 "L" Street, N.W.
Suite 1250
Washington, D.C. 20036
Counsel for Respondents

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

7pp

TABLE OF AUTHORITIES

CASES	Page
Crawford v. La Boucherie Bernard, Ltd., 815 F.2d 117 (D.C. Cir. 1987), cert. denied, 108 S. Ct. 328 (1987)	2
Ellis National Bank v. Irving Trust Co., 786 F.2d 466 (2d Cir. 1986)	2, 4
Sheet Metal Workers International Ass'n Local No. 9 v. Sheet Metal Workers Local No. 9 Pension Fund, et al., 82-CV-3128 (U.S.D.C. D. CO)	3
United Metal Products Corp. v. National Bank, 811 F.2d 297 (6th Cir. 1987), cert. dismissed, No. 86-1786 (April 22, 1988)	2, 4
Statutes	
Labor Management Reporting and Disclosure Act, 29 U.S.C. § 401	3, 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1105

CURTIS GUIDRY,

Petitioner,

v.

SHEET METAL WORKERS NATIONAL PENSION FUND;
SHEET METAL WORKERS LOCAL UNIONS AND
COUNCILS PENSION PLAN;
SHEET METAL WORKERS INTERNATIONAL
ASSOCIATION, LOCAL 9;
SHEET METAL WORKERS LOCAL NO. 9
PENSION FUND, *et al.*,

Respondents.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit**

SUPPLEMENTAL BRIEF IN OPPOSITION

This supplemental brief is filed by respondents in reply to the Brief of the United States as *Amicus Curiae*.

As the United States argues—and as we acknowledged in our Brief Opposing Petition for Writ of Certiorari ("Br. Opp.") (at 9)—there *is* a circuit conflict on the broad question whether or not there is a criminal misconduct exception to ERISA's anti-alienation provision. Contrary to the government's submission, however, for two reasons this case is *not* an appropriate vehicle for resolving that conflict. Br. Opp. at 8-9.

1. First, the United States real quarrel with the decision below is that the Tenth Circuit "misunderstood the relevant facts." Gov.Br. at 11. This Court, of course, does not sit to correct such factual mistakes.

The Tenth Circuit's actual *holding* in this case was:

> Given [the] . . . professed purpose of ERISA [Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.*], we do not think [the] anti-alienation provision[s] . . . preclude impoundment of the beneficial interest of a trustee *who has damaged the trust through embezzlement.* We therefore hold that the district court properly imposed a constructive trust upon plaintiff's pension benefits. . . . [Pet. App. A-9 (emphasis supplied)].

Thus, the Tenth Circuit proceeded in this case on the premise that the petitioner embezzled from the *very pension fund* being asked to pay his pension. As such, this case is parallel—both in its reasoning and in its result—to *Crawford v. La Boucherie Bernard, Ltd.*, 815 F.2d 117 (D.C. Cir. 1987) cert. denied, 108 S. Ct. 328 (1987), which holds that the anti-alienation provisions of ERISA do *not* preclude a trust fund from refusing to make pension payments to a former trustee who breached *his* fiduciary duty with regard to the fund *itself*.

The United States recognizes that because ERISA itself "authorizes broad remedies to counter breaches of fiduciary duty by trustees of employee benefit plans," the *Crawford* holding is not necessarily inconsistent with the holdings in the cases asserted by petitioner to be in conflict with the Tenth Circuit's decision in this case, *Ellis National Bank v. Irving Trust Co.*, 786 F.2d 466 (2d Cir. 1986) and *United Metal Products Corp. v. National Bank*, 811 F.2d 297 (6th Cir. 1987), cert. dismissed, No. 86-1786 (April 22, 1988). Indeed, in *Crawford* the United States *supported* a remedy similar to the one the government now opposes in this case. Gov. Br. at 12-13 & n.14.

The United States maintains, however, that in fact petitioner embezzled from the union *alone*, and not the pension fund. At this stage, that error, even if made, does not warrant another round of review or create a conflict in the circuits. For, whatever the true facts may be, as a matter of judicial precedent the Tenth Circuit opinion's legal impact is limited to the facts as perceived in that opinion. It is on the basis of those facts that later litigants and judges will understand the holding and apply it to other cases. Thus, in considering whether the opinion below created or exacerbated a circuit conflict and therefore comes within this Court's standards for granting *certiorari*, the focus must be upon how the Tenth Circuit resolved the factual situation as that court saw that situation, not upon whether the court below misunderstood the true facts.[1]

2. The second exceptional circumstance in this case is that the underlying judgment was based *not* on a *state* cause of action, as in the other courts of appeals cases concerning ERISA's anti-alienation provision, *but* on a *federal* statute, the Labor Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 401 et seq. The United States discusses this circumstance at length, and advises that although "[t]he question is not without difficulty . . . [o]n balance, . . . the better view is that

---

[1] Moreover, the true facts are considerably more ambiguous than the United States suggests: A considerable proportion of the funds at issue were embezzled by petitioner by writing checks to the union in his capacity as trustee of two local trust funds, and then depositing those checks to his own account rather than transmitting them to the union. Whether title to those moneys ever passed to the union before they were diverted by petitioner to his own pocket is far from clear; indeed, precisely that issue was the subject of litigation between the union and the local trust funds, separate from this litigation, in which the union sought to recover from those trust funds the money that those funds owed the union for administration. That litigation was eventually settled. *Sheet Metal Workers Local No. 9 v. Sheet Metal Workers Local No. 9 Pension Fund, et al.*, 82-CV-3128 (U.S.D.C. D. CO).

ERISA's anti-alienation provision precludes the use of pension benefits to satisfy an LMRDA judgment debt." Gov. Br. at 18.[2] Therefore, says the government brief, "the fact that this case involves embezzlement by a union official does not militate against review." *Id.*

There is, however, *no* circuit conflict on the difficult LMRDA/ERISA harmonization issue presented by this case. Indeed, as far as we are aware, there is no other case in which the issue has even arisen. And if, as we maintain and as the government indicates may well be the case (although "on balance" the government believes otherwise), the two statutes, construed together, permit the remedy provided in this case, the Court will have no reason to reach the broader issue proffered by petitioner.

In fact, two years ago, in counselling *against* granting certiorari in *United Metal Products*, *supra*, the United States indicated to this Court that, precisely because of the LMRDA question, this very case raises issues quite separate from those decided in the cases the government now finds in conflict. *Ellis National Bank*, and *United Metal Products*:

> Other than the Eleventh Circuit in *St. Paul Fire & Marine Ins. Co.* [752 F.2d 550 (11th Cir. 1985)], the courts that have recognized exceptions from the anti-alienation provisions have found a basis for the exception in federal law. . . . [I]n *Crawford v. La Boucheries Bernard, Ltd.*, [*supra*] . . . in permitting a pension plan to draw upon the pension account balance of a plan fiduciary as compensation for adjudicated losses resulting from his breaches of trust, the court concluded that such action was "consistent with ERISA's purpose of providing effective rem-

[2] *See* Gov. Br. at 15-18. The government concludes (incorrectly, in our view) that ERISA's anti-alienation provision is for some reason more "specific" than the LMRDA's express prohibition of breaches of fiduciary responsibility by union officials, and provision of a broad range of remedies where such breaches occur.

> edies for fiduciary breaches" (815 F.2d at 120). In *Guidry v. National Sheet Metal Workers' National Pension Fund*, 641 F.Supp. 360, 362-63 (D. Colo. 1986), where the district court ordered that a union official's pension account be held in constructive trust until the union's judgment against the official (who had embezzled from the union) was satisfied, its decision was based on the fact that Congress, through the Labor Management Relations Act of 1947 and the Labor Management Reporting and Disclosure Act of 1959, had made clear that union members must be protected from corrupt union officials. [*United Metal Products Corp. v. National Bank of Detroit*, No. 86-1786, Brief for the United States as Amicus Curiae at 10-11 n.8].

Thus, this case is a poor vehicle for deciding the state-law based issue upon which a circuit conflict does exist: That issue can be reached, if at all, only by deciding as well an issue of great complexity involving another federal statute, as to which there is *no* conflict, and, indeed, *no* other reported federal case in point.

CONCLUSION

For the reasons stated above and in our earlier Brief, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

WALTER C. BRAUER III
BRAUER & BUESCHER, P.C.
1563 Gaylord
Denver, CO 80206
(303) 333-7751
(Counsel of Record)

RAYMOND J. SWEENEY
1898 "L" Street, N.W.
Suite 1250
Washington, D.C. 20036
Counsel for Respondents

JOINT

APPENDIX

No. 88-1105

Supreme Court, U.S.
FILED
AUG 9 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

CURTIS GUIDRY,

Petitioner,

v.

SHEET METAL WORKERS NATIONAL PENSION FUND; SHEET METAL WORKERS' LOCAL UNIONS AND COUNCILS PENSION PLAN; SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 9; SHEET METAL WORKERS LOCAL NO. 9 PENSION FUND; et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

JOINT APPENDIX

Eldon E. Silverman*
Silverman and Gelman, P.C.
1600 Stout, Suite 1000
Denver, Colorado 80202
(303) 573-5266

Kenneth T. Eichel
Elrod, Katz, Preeo & Look, P.C.
1120 Lincoln, Suite 1100
Denver, Colorado 80203
(303) 832-1900

Counsel for Petitioner

Joseph M. Goldhammer*
Brauer & Buescher, P.C.
1563 Gaylord
Denver, Colorado 80206
(303) 333-7751

Raymond J. Sweeney
1898 "L" Street, N.W.
Suite 1250
Washington, D.C. 20036
(202) 659-4656

Counsel for Respondents

*Counsel of Record

Petition For Certiorari Filed December 31, 1988
Certiorari Granted June 26, 1989

TABLE OF CONTENTS

Page

Chronological List of Relevant Docket Entries..... 1

Complaint..... 4

Answer With Counterclaim for Interpleader by Defendant Sheet Metal Workers' Local Unions and Councils Pension Fund and its Trustees..... 11

Motion for Summary Judgment by Plaintiff 16

Motion to Dismiss or, in the Alternative, for Summary Judgment by Defendants, with accompanying Exhibit 1, the Affidavit of William F. Stephens..... 18

Order Granting Motion to Intervene and for Joinder.. 28

Complaint by Intervenor Sheet Metal Workers International Association, Local No. 9..... 29

Answer of Curtis Guidry to Complaint of Intervenor with attached Exhibit A..... 37

Answer to Intervenor's Complaint by Defendant Sheet Metal Workers' Local Unions and Councils Pension Plan and its Trustee 47

Answer to Intervenor's Complaint by Defendant Sheet Metal Worker's National Pension Fund and its Trustee 49

Answer to Intervenor's Complaint by Defendant Sheet Metal Workers Local No. 9 Pension Fund.. 51

Stipulation for Entry of Judgment 52

Judgment 59

First Writ of Continuing Garnishment issued by the Clerk on January 27, 1986..... 61

TABLE OF CONTENTS – Continued

Page

Traverse and Motion for Hearing to Answers to Writ of Continuing Garnishment Filed by Sheet Metal Workers' Local No. 9 Pension Fund 71

Motion for Summary Judgment on Sixth Claim for Relief by Intervenor with accompanying Second Affidavit of William F. Stephens 72

Second Writ of Continuing Garnishment issued by the Clerk on May 1, 1986 85

Traverse and Motion for Hearing to Answers to Writ of Continuing Garnishment Filed by Sheet Metal Workers' Local No. 9 Pension Fund 95

Second Judgment 96

Motion for New Trial or to Alter, Amend and Vacate Judgment With Citation of Authority filed by Plaintiff 98

Order Denying Motion for New Trial 100

Opinion of United States Court of Appeals for the Tenth Circuit 102

SCHEDULE OF OMITTED MATERIAL

The following opinions, decisions and materials have been omitted in the printing of this Appendix because they appear in the following sections in the Appendix to the Petition for Writ of Certiorari by Petitioner:

Memorandum Opinion and Order of the District Court dated July 23, 1986 ..... B1-5

Reporter's Transcript of Proceedings on Various Motions taking place July 17, 1986 ..... C1-23

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Date	*Entry*
4/26/84	Complaint filed
10/29/84	Answer With Counterclaim for Interpleader, filed by Defendant Sheet Metal Workers' Local Unions and Councils Pension Fund and its Trustees
10/29/84	Answer With Counterclaim for Interpleader, filed by Defendant Sheet Metal Workers' National Pension Fund and its Trustees
12/10/84	Answer to Counterclaim, filed by Plaintiff Guidry
6/4/85	Motion for Summary Judgment, with Brief in Support and Affidavit, filed by Plaintiff Guidry
7/16/85	Motion to Dismiss, or in the Alternative, for Summary Judgment, with accompanying Brief and Affidavit, filed by Defendants
8/7/85	Order by the Court Granting Motion to Intervene by Defendant Sheet Metal Workers International Association, Local No. 9, and to join Defendant Sheet Metal Workers Local No. 9 Pension Fund under FRCP 19
8/7/85	Complaint, filed by Intervenor Sheet Metal Workers International Association, Local No. 9
9/12/85	Answer of Plaintiff Guidry to Complaint of Intervenor
9/25/85	Answers to Intervenor's Complaint, filed by Defendant Sheet Metal Workers' Local Unions and Councils Pension Fund and its Trustees, Sheet Metal Workers' National Pension Fund and its Trustees, and Sheet Metal Workers Local No. 9 Pension Fund

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES (Cont.)

1/9/86	Stipulation for Entry of Judgment, against Plaintiff Guidry
1/14/86	Judgment entered against Plaintiff Guidry and in favor of Defendant Sheet Metal Workers International Association, Local No. 9, Intervenor
1/27/86	Issuance by Clerk of three separate Writs of Garnishment, issued to Defendants Sheet Metal Workers Local No. 9 Pension Fund, Sheet Metal Workers' Local Unions and Councils Pension Fund, and Sheet Metal Workers' National Pension Fund
3/12/86	Three Answers to Writs of Garnishment, filed by Defendants Sheet Metal Workers' National Pension Fund, Sheet Workers' Local Unions and Councils Pension Fund, and Sheet Metal Workers Local No. 9 Pension Fund, showing no assets
3/17/86	Three Traverses and Motions for Hearing to Answers to Writs of Continuing Garnishments, filed by Intervenor/Judgment Creditor Sheet Metal Workers International Association, Local No. 9
4/23/86	Motion for Summary Judgment, filed on Sixth Claim for Relief by Intervenor Sheet Metal Workers International Association, Local No. 9, with accompanying Brief and Affidavit
5/1/86	Issuance by Clerk of three Writs of Garnishment, issued to Sheet Metal Workers Local No. 9 Pension Fund, Sheet Metal Workers' National Pension Fund, and Sheet Metal Workers' Local Unions and Councils Pension Fund
5/22/86	Response of Plaintiff Guidry to Motion of Intervenor for Summary Judgment Upon its Sixth Claim for Relief

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES (Cont.)

7/1/86	Three Traverses and Motions for Hearing to Answers to Writs of Garnishment, filed by Intervenor/Judgment Creditor Sheet Metal Workers International Association, Local No. 9
7/2/86	Three Answers to Writs of Garnishment filed by Sheet Metal Workers' Local Unions and Councils Pension Fund, Sheet Metal Workers Local No. 9 Pension Fund, and Sheet Workers' National Pension Fund, showing no assets
7/17/86	Oral Argument on Plaintiff Guidry's Motion for Summary Judgment, Defendants' Cross-Motion for Summary Judgment, and Intervenor's Motion for Summary Judgment on Sixth Claim, with Plaintiff's Motion granted, Defendants' Cross-Motion denied, and Intervenor's Motion granted
7/23/86	Memorandum, Order and Opinion by Court regarding Motions for Summary Judgment
7/23/86	Judgment entered, granting constructive trust in favor of Defendant Sheet Metal Workers International Association, Local No. 9, and against Plaintiff Guidry as to all pension funds accrued to date of judgment and owed to Plaintiff by three pension funds, and with constructive trust on future payments, until $275,000.00 judgment, entered 1/14/86, plus interest has been satisfied
8/5/86	Motion for New Trial or to Alter, Amend and Vacate Judgment of Plaintiff With Citation of Authority and proposed Affidavit of Plaintiff Guidry
8/20/86	Order Denying Motion for New Trial or to Alter, Amend or Vacate Judgment
9/2/86	Notice of Appeal filed by Plaintiff Guidry

UNITED STATES DISTRICT COURT
STATE OF COLORADO

COMPLAINT 84-879

CURTIS GUIDRY,

Plaintiff,

vs.

SHEET METAL WORKERS NATIONAL PENSION FUND ET. AL,

Defendants.

(Filed Apr. 26, 1984)

COMES NOW the Plaintiff, by and through undersigned counsel, to make his claims for relief against the Defendants as follows:

IDENTITY OF THE PARTIES

1. Plaintiff is incarcerated in a Federal correctional institution in Safford, Arizona. His address follows the conclusion of this complaint.

2. Defendant Sheet Metal Workers National Pension Fund ("National Pension Fund") is an unincorporated association organized for the purpose of administering pensions for employees who retire from covered employment. Messrs Carlos, Roff, Stringer and Snyder were Trustees of said fund at all times relevant hereto.

3. Defendant Sheet Metal Workers Local Unions and Councils Pension Fund ("Unions & Councils Pension Fund") is an unincorporated association organized for the

purpose of providing retirement benefits for salaried officials and employees of local unions and councils. Messrs Carlough, Clay, Cuddihy, Scott and Williams were all trustees of said fund at all times relevant hereto.

COMMON FACTUAL ALLEGATIONS

1. Plaintiff was first elected an officer of Local Union No. 9, Sheet Metal Workers' International Association on or about July 1, 1961. Plaintiff remained an officer in said local union until on or about September 30, 1981.

2. Plaintiff elected to retire and obtain Early Retirement Pension from Defendant Sheet Metal Workers Local Unions & Councils Pension Fund. On or about September 30, 1981, Plaintiff had more than 9 years credited service and was therefore eligible to receive Early Retirement Pension benefits in the amount of $577 per month.

3. At the time of his retirement, Plaintiff had more than 15 years of credited service with more than 25 years of pension credit in the National Pension Fund, thereby entitling him to $647.51 Early Retirement Pension benefits.

4. Defendants denied Plaintiff's application for Pension benefits on December 3, 1982 and reaffirmed their denial subsequent to Plaintiff's appeal on October 31, 1983.

5. All Defendants denied Plaintiff pension benefits for the reason that he had allegedly embezzled funds from the welfare and pension funds of Local Union No. 9. The plans governing payment of benefits by the Local

Union and Councils Fund as well as the National Pension Fund make no eligibility exception for such acts.

FIRST CLAIM FOR RELIEF

Employee Retirement Income Security Act

6. Plaintiff hereby reincorporates and realleges the allegations of Paragraphs 1 through 5 as if fully set forth herein.

7. This claim arises under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 USC Sections 1101, et seq., and more particularly Section 1132(a)(1)(B) thereof. This Court has jurisdiction pursuant to 29 USC Section 1132(e).

8. Under the terms of the Local Unions and Councils Pension Plan, Plaintiff was a covered person, over the age of 55 but under the age of 65 with more than 9 years of credited service.

9. Defendants National Pension Fund and Local Unions and Councils Pension Plan, together with their respective trustees, denied Plaintiff's respective application for Early Retirement Pension benefits for the reason that he had allegedly participated in thefts of funds from Local Union No. 9 Pension and Welfare Funds. This common basis for denial of Plaintiff's pension benefits does not disquality [sic] Plaintiff from receiving such benefits under the respective Plans.

WHEREFORE, Plaintiff prays as follows:

A. For an order requiring Defendants Sheet Metal Workers' Local Unions and Councils Pension Fund and Sheet Metal Workers' National Pension Fund to reinstate

Plaintiff as a beneficiary under their respective plans and to pay Plaintiff a monthly pension of $577.00 per month from September 30, 1981, from Local Unions and Councils Pension Fund and $647.51 per month from September 30, 1981 from the National Pension Fund; and

B. Plaintiff be granted his costs of suit including a reasonable attorneys fee pursuant to 29 USC 1132(g), expert witnesses fees, prejudgment and post judgment interest and for such other and further legal or equitable relief which as to the Court seems just and proper.

SECOND CLAIM FOR RELIEF

Negligence

10. Plaintiff hereby reincorporates and realleges the allegations of Paragraph 1 through 9 as if fully set forth herein.

11. Defendants owed Plaintiff a duty to administer the provisions of the respective plans with the use of sound judgment, and not in an arbitrary or oppressive manner.

12. Defendants actions in denying Plaintiff his early retirement pension benefits were arbitrary, capricious, attended by circumstances of malice or insult, or a wanton or reckless disregard of Plaintiff's rights and feelings.

13. By reason of the action of these Defendants, Plaintiff has been denied his Early Retirement Pension benefits to his damage.

14. The injury complained of is attended by circumstances entitling Plaintiff to reasonable exemplary damages.

WHEREFORE, Plaintiff prays as follows:

A. For compensatory damages for the full pension benefits accrued and unpaid to the time of trial; and

B. For an order requiring Defendants to reinstate Plaintiff as a beneficiary under the terms of their respective plans and ordering Defendants to pay Plaintiff a monthly pension of $577.00 from the Local Unions and Councils Pension Plan and $647.51 from the National Pension Fund; or

C. For the value of prospective pension benefits; and

D. For reasonable exemplary damages; and

E. For judgment and post judgment interest, his costs of suit including expert witness fees and for such and further legal or equitable relief as this Court may deem proper.

THIRD CLAIM FOR RELIEF

Breach of Contract

15. Plaintiff hereby reincorporates and realleges the allegations of paragraphs 1 through 14 as if fully set forth herein.

16. Plaintiff was eligible to receive Early Retirement Pension Benefits form National Pension Fund under the

terms and conditions of that plan at the time of his application.

17. Plaintiff was eligible to receive Early Retirement Pension Benefits from the Local Union and Councils Pension Fund at the time of his application under the terms and conditions of that plan.

18. Both Defendant funds, through their respective trustees have refused to pay the benefits in question for the reason that Plaintiff allegedly participated in theft of funds from the welfare and pension funds of Local Union No. 9. Such theft by an applicant does not disqualify an applicant under the terms of either plan.

19. Both Defendant funds, through their respective trustees, have refused to pay the benefits in question in clear violation of the terms of the respective plans, to Plaintiff's damage.

WHEREFORE, Plaintiff prays as follows:

A. For an order requiring Defendant Sheet Metal Workers Local Unions and Councils Fund and Sheet Metal Workers National Pension Fund to reinstate Plaintiff as a beneficiary under their respective plans, or

B. For the value of prospective pension benefits from the time of trial; and

C. For judgment against Defendant Sheet Metal Workers Local Unions and Councils Pension Fund in a sum to accrue at a rate of $577 per month from September 30, 1981 to the date of judgment.

D. For judgment against Defendant Sheet Metal Workers National Pension Fund in a sum to accrue at the

rate of $647.51 per month from September 30, 1981 to the date of judgment, and

E. For prejudgment and post judgment interest, his costs of suit, including expert witness fees and such other further legal or equitable relief as this Court may deem proper.

Plaintiff demands a trial to a jury of 6 as to all issues.

(Signature omitted in printing)

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

Civil Action No. 84-Z-879

(Title omitted in printing)

ANSWER
WITH
COUNTERCLAIM FOR INTERPLEADER

COMES NOW the Defendants Sheet Metal Workers' Local Unions and Councils Pension Fund, and its Trustees, Edward J. Carlough, Cecil D. Clay, George J. Cuddihy, Eurie E. Williams, Jr., and Richard J. Scott (hereinafter referred to collectively as the Defendants), by and through the undersigned Counsel answer the complaint and allege as follows:

FIRST DEFENSE

1. With respect to the allegations contained in paragraph no. 1 of the complaint, the Defendants lack sufficient knowledge to form a basis as to the truth or falsity of those allegations and for lack of such knowledge, deny them.

2. The allegations contained in paragraph no. 2 are admitted.

3. The allegations contained in paragraph no. 3 are admitted.

4. With respect to the allegations contained in paragraph no. 1 (COMMON FACTUAL ALLEGATIONS) of the complaint, the Defendants lack sufficient knowledge

to form a basis as to the truth or falsity of those allegations and for lack of such knowledge, deny them.

5. The allegations contained in paragraph no. 2 (COMMON FACTUAL ALLEGATIONS) with respect to the Plaintiff's election "to retire and obtain Early Retirement" from the Defendants is admitted. All of the remaining allegations contained in paragraph no. 2 are denied.

6. With respect to the allegations contained in paragraph no. 3 (COMMON FACTUAL ALLEGATIONS) of the complaint, the Defendants lack sufficient knowledge to form a basis as to the truth or falsity of those allegations and for lack of such knowledge, deny them.

7. The allegations contained in paragraph no. 4 (COMMON FACTUAL ALLEGATIONS) are admitted.

8. The allegations contained in paragraph no. 5 (COMMON FACTUAL ALLEGATIONS) that the "Defendants denied Plaintiff pension benefits . . . " is admitted. The remaining allegations of that paragraph are denied.

9. With respect to the allegations contained in paragraph no. 6, the Defendants incorporate by reference herein their answers set forth in paragraphs nos. 4, 5, 6, 7, and 8 above.

10. The allegations contained in paragraph no. 7 constitute conclusions of law and require no answers. However, insofar as those allegations may be construed as constituting allegations of fact, the Defendants lack sufficient knowledge to form a basis as to the truth or falsity of those allegations and for lack of such knowledge, deny them.

11. With respect to the allegations contained in paragraph no. 8 of the complaint, the Defendants admit that the Plaintiff was "over the age of 55 but under the age of 65". All of the remaining allegations contained in paragraph no. 8 are denied.

12. The Defendants admit that they "denied plaintiff's . . . application for Early Retirement Pension benefits . . . ". The remaining allegations contained in paragraph no. 9 and subparagraphs A & B are denied.

13. With respect to the allegations contained in paragraph no. 10, the Defendants incorporate by reference herein their answers set forth in paragraphs nos. 4, 5, 6, 7, 8, 9, 10, 11, and 12 above.

14. The allegations contained in paragraph no. 11 constitute conclusions of law and require no answers. However, insofar as those allegations may be construed as constituting allegations of fact, the Defendants lack sufficient knowledge to form a basis as to the truth or falsity of those allegations and for lack of such knowledge, deny them.

15. The allegations contained in paragraph no. 12 are denied.

16. The allegations contained in paragraph no. 13 are denied.

17. The allegations contained in paragraph no. 14 and subparagraphs A, B, C, D, and E are denied.

18. With respect to the allegations contained in paragraph no. 15, the Defendants incorporate by reference herein their answers set forth in paragraphs nos. 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, and 17 above.

19. With respect to the allegations contained in paragraph no. 16 of the complaint, the Defendants lack sufficient knowledge to form a basis as to the truth or falsity of those allegations and for lack of such knowledge, deny them.

20. The allegations contained in paragraph no. 17 are denied.

21. The allegation that the Defendants "have refused to pay the benefits in question . . . " is admitted. The remaining allegations contained in paragraph no. 18 are denied.

22. Insofar as these Defendants are concerned, the allegations contained in paragraph no. 19 and subparagraphs A, B, C, D, and E are denied.

The Defendants deny each and every allegation not expressly admitted. In addition, the Defendants deny that the Plaintiff is entitled to any relief whatsoever.

SECOND DEFENSE

In the event that the Plaintiff is found to have accrued a vested interest in the Defendant's pension plan, equity requires that such interest be forfeited or made payable to the entities that were the victims of the Plaintiff's embezzlements.

THIRD DEFENSE – COUNTERCLAIM FOR INTERPLEADER

In the alternative, if the Plaintiff is found to have accrued a vested interest in the Defendants' pension plan, the Defendants may be exposed to double liability in that

the Plaintiff has demanded payment of that interest and a victim of the Plaintiff's embezzlements, Local 9, Sheet Metal Workers' International Association, (Local 9) has also demanded payment of that same interest.

WHEREFORE, the Defendants request that:

(1) the Court order Local 9 to be made a party defendant and to respond to the complaint and to this counterclaim;

(2) the Court order the Plaintiff and Local 9 to interplead their respective claims;

(3) the Court adjudge whether the Plaintiff or Local 9 is entitled to a vested pension interest in controversy;

(4) the Court discharge these Defendants from all liability except to the person it shall adjudge entitled to that interest; and

(5) the court award these Defendants all costs and attorney's fees.

(Signatures omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 84-M-879

(Title omitted in printing)

MOTION FOR SUMMARY JUDGMENT

COMES NOW the Plaintiff, by and through his respective attorney, and moves the Court as follows:

1. Plaintiff moves for entry of summary judgment pursuant to F.R.C.P. 56 upon his First and Third Claims for Relief, unlawful forfeiture of benefits under ERISA and breach of contract respectively.

2. Plaintiff is entitled to judgment as a matter of law, that Defendant Funds violated 29 U.S.C. 1053(a) of ERISA by enforcing a forfeiture of Plaintiff's benefits for dishonesty conduct. Defendant Funds thereby breached their contract with Plaintiff.

a. For the reasons stated in legal authority cited in his accompanying Memorandum Brief, which is incorporated by this reference, 29 U.S.C. 1053(a) prohibits forfeiture of pension benefits based upon employee misconduct. Such forfeiture occurs upon the withholding of pension benefits by the Funds. Plaintiff's pension benefits are expressly nonforfeitable under this section. "Automatic" forfeiture based upon employee misconduct is prohibited by Sec. 1053(a).

3. There is no dispute as to any material fact regarding Plaintiff's qualification for early retirement benefits under the provisions of the respective Plans. The only dispute exists with respect to the definitions relied upon

by the Funds contained in the Plan in the context of the non-forfeiture protection of 29 U.S.C. 1053(a).

4. Plaintiff has simultaneously filed his Affidavit which is incorporated herein by reference.

WHEREFORE, Plaintiff moves for Summary Judgment in his favor and against the Defendants on his first and third claims for relief.

Respectfully submitted this 4th day of June, 1985.

(Signature omitted in printing)

(Certificate of Mailing omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 84-M-879

(Title omitted in printing)

MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

COMES NOW the Defendants, Sheet Metal Workers National Pension Fund, et al., by and through their attorneys and move the Court pursuant to Rule 12(b) (1) of the Federal Rules of Civil Procedure for an order dismissing the complaint or, in the alternative, pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, for an order granting summary judgment in favor of the Defendants, and for such other and further relief as may seem just and proper to the Court. This motion is based upon the pleadings herein, the Brief accompanying this motion plus the affidavit affixed thereto.

In summary, there is not a genuine issue of fact in that:

(1) The Defendants' interpretation of their respective plan rules was reasonable in light of the governing equitable principle and the Congressional objectives embodied in the Employee Retirement Income Security Act of 1974, as amended (ERISA), 29 U.S.C. §§ 1001, et seq.

(2) The Plaintiff is consequently not entitled to a pension benefit from the Defendants.

In further support of this motion, the Court is respectfully referred to the Brief filed herewith.

(Signatures omitted in printing)

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 84-M-879

(Title omitted in printing)

AFFIDAVIT OF WILLIAM F. STEPHENS

Now comes, William F. Stephens, who being duly sworn deposes and says:

1. I am William F. Stevens. My office is located at 770 West Hampton, Suite 300, Englewood, Colorado 80110.

2. I was appointed the Business Manager of Local Union No. 9, Sheet Metal Workers International Association (hereinafter referred to as Local No. 9) in December of 1981 by the Executive Board of Local 9. I was subsequently elected to that position by the members of Local 9 in June, 1982, and again in June, 1985.

3. Prior to my appointment as Local 9's Business Manager, I held the elected position of Business Agent of

Local 9 from July, 1976, to the date of my appointment as Business Manager.

4. I have control over and access to all of Local 9's records.

5. The facts set forth in this affidavit are based upon my personal knowledge of the events that occurred and my review of Local 9's records relevant to this matter.

6. In July of 1961, Guidry was elected an Officer of Local 9. He remained in office pursuant to periodic elections until 1981.

7. In 1962, Guidry was elected a Trustee of Local 9's welfare plan, and in 1967 Guidry was elected a Trustee of Local 9's pension. Guidry was also Chairman of the Board of Trustees of both local plans. He retained those positions until 1981.

8. Affixed hereto as Exhibit A is a report prepared by Local 9's accountants with respect to their review of the funds embezzled by Guidry.

9. In 1981, the Department of Labor conducted a review of Local 9's accounting procedures that resulted in the discovery of Guidry's embezzlements.

10. Local 9 has approximately 1400 members. In December, 1977, Local 9's dues were increased in response to Guidry's specific request for additional dues to cover the union's purported increase in its operating costs.

11. Local 9 maintained a checking account at the Central Bank of Denver. Checks would be drawn on that account for two purposes: (1) the deposit of funds with

the Bank for federal withholding tax purposes; and (2) the transfer to Local 9's fringe benefit funds of contributions owed on behalf of Local 9's members. Guidry prepared or directed an employee to prepare "extra" checks that he then had deposited in his personal account at the Central Bank.

12. Guidry misappropriated numerous checks which had been made payable by the pension fund and the welfare fund to Local 9 for his own use.

13. Pursuant to the accountants' review of Local 9's books in 1981, it was discovered that certain CDs had been misappropriated by Guidry.

14. The accountants' review of Local 9's records also established that approximately $76,000 in cash dues payments had been misappropriated by Guidry.

15. The accountants' review of Local 9's records also established that Agnes Short, Local 9's former bookkeeper and administratrix of its fringe benefit plans acted in harmony with Guidry to embezzle approximately $184,000 from Local 9.

16. In the early part of 1982, the U.S. Attorneys Office in Denver filed criminal charges against Guidry that resulted in plea bargaining and Guidry's entering a plea to a violation of 19 U.S.C. § 501(c).

17. I have been informed by the Sheet Metal Workers National Pension Fund that, if the Trustees of that Fund are required to interpret their rules as providing credited service to Guidry for his years of crime, he will receive a monthly pension benefit of approximately $75.00.

18. I have been informed by the Sheet Metal Workers Local Unions & Councils Pension Fund that, if the Trustees of that Fund are required to interpret their rules as providing credited service to Guidry for his years of crime, he will receive a monthly pension benefit of approximately $1,100.

/s/ William F. Stephens
William F. Stephens

(Jurat omitted in printing)

EXHIBIT A

ARTHUR YOUNG

ARTHUR YOUNG & COMPANY
1670 BROADWAY SUITE 2500
DENVER, COLORADO 80202

(303) 831-9500 TELEX 45-4423

International Representatives and Trustees for
Sheet Metal Workers Local Union No. 9
Charles A. Biggert
Victor S. Stepsay

We have applied certain agreed-upon procedures, as discussed below, to the accounting records of Sheet Metal Workers Local Union No. 9, for the period from January 1970 through September 1981. Our procedures were performed solely to assist you in evaluating the disposition of certain funds and is not to be used for any other purpose. Our procedures are as follows:

a. We examined all cancelled checks issued by and stored at Local Union No. 9 for the period from

January 1974 through September 1981; obtained from Central Bank of Denver copies of certain cancelled checks issued by Local Union No. 9 and examined such cancelled checks which were missing from the Local's records for the period from January 1974 through September 1981; obtained from Central Bank of Denver copies of certain cancelled checks issued by Local Union No. 9 and examined such cancelled checks, which were made payable to Central Bank of Denver during the period from January 1970 through December 1973; we compared the information on all cancelled checks and copies of cancelled checks with the warrants' register.

b. We examined cancelled checks and copies of cancelled checks, as received from Central Bank of Denver, issued by Local Union No. 9's Pension Trust and its Welfare Fund, of which Sheet Metal Workers Local Union No. 9 is the payee; examined Local Union No. 9's cash receipts' tickets, bank deposit journals, and cash receipts' registers, and bank statements for proper recording and depositing of such amounts; for the period from January 1963 through December 1969 for the Welfare Fund and for the period from January 1967 through December 1969 for the Pension Trust, compared these checks, as recorded in the respective check registers, issued to Sheet Metal Workers Local Union No. 9 with Local Union No. 9's bank deposit journals and cash receipts' registers.

c. We selected a random sample of cash receipts' tickets issued by Local Union No. 9; traced the selected cash receipts' tickets to the bank deposit journal and cash receipts' registers.

d. We selected a random sample of cancelled checks issued by Local Union No. 9; traced the selected cancelled checks to the warrants' registers; examined documentation supporting the selected cancelled checks; examined the cancelled checks for authorized

signatures, and proper endorsement and bank cancellation.

e. We examined all available documentation supporting Local Union No. 9's transactions involving certificates of deposit and savings bank accounts and the related interest revenue; mailed requests for positive confirmation of balances as of September 30, 1981 and for positive confirmation of closed savings bank accounts; examined the bank deposit journals and cash receipts' registers for the recording of purchases and sales of certificates of deposits, savings bank accounts' transactions, and earned interest revenues; and calculated an approximate amount of interest which should have been earned during the period.

f. For the period from January 1975 through September 1981 we performed proofs of cash on Local Union No. 9's operating bank account; footed the bank deposit journals and cash receipts' registers; reconciled year-end book cash balances to bank statements; reviewed the bank statements for unrecorded cash receipts and cash disbursements; compared deposits per the bank deposit journals with deposits per the bank statements; compared deposits per the bank deposit journals with respective totals of cash receipts per the cash receipts' registers; accumulated the footed totals of monthly cash receipts per the cash receipts' registers and compared the accumulated totals with cash receipts per the quarterly trustee reports; accumulated the footed totals of monthly cash disbursements per the warrants' registers and compared the accumulated totals with cash disbursements per the quarterly trustee reports.

g. With regard to the accounting records of the Building Association which is related to Sheet Metal Workers Local Union No. 9 we examined cancelled checks for authorized signatures, and proper endorsement and bank cancellation; traced the cancelled checks to the check registers; traced deposits per the cash receipts'

registers to deposit slips and bank statements; examined the settlement sheet dated May 31, 1978, documenting the sale of the property at 3130 West Louisiana Avenue, Denver, Colorado and reviewed the disposition of the sale's proceeds.

h. We examined the payroll records for deductions made from employees' weekly payroll checks for the purpose of crediting the employees' accounts at the Sheet Metal Workers Local Union No. 9's Credit Union; accumulated the recorded deductions on a monthly basis and compared the total with checks issued by Local Union No. 9 to the Credit Union; examined certain Credit Union records which detail the crediting of Local Union No. 9's employees' Credit Union accounts; compared the amount of the checks issued to the Credit Union with the amount of funds credited to the employees' Credit Union accounts.

i. We examined letters received by Local Union No. 9 from the Sheet Metal Workers International Association which detail all errors and miscalculations made by Local No. 9 with respect to remitting certain portions of collected members' dues to the Association; traced the errors and miscalculations to documentation supporting the items' eventual correction.

Our findings are as follows:

a. Checks written to Central Bank of Denver, and whose endorsements indicate deposit to Curtis Guidry's personal bank account at Central Bank of Denver $228,935

b. Checks written to Local Union No. 9 by Local Union No. 9's Pension Trust and Welfare Fund as reimbursement for allocated clerical expenditures whose endorsements indicate they were

deposited to Curtis Guidry's personal bank accounts:

Welfare Fund	216,736
Pension Trust	121,844

c. Cash disbursements made to Local Union No. 9's Credit Union in excess of amounts authorized for deduction from employees' weekly payroll checks. All excess amounts were credited to Agnes Short's or Dwayne Short's Credit Union accounts — 18,920

d. Accumulated amount of checks issued to Agnes Short whose endorsements indicate they were deposited in her personal bank account. These checks were recorded in the warrants' registers journals as significantly smaller items and payable to outside vendors — 164,983

e. Certificates of deposit which are missing from Local Union No. 9's control — 95,000

f. Estimated shortage of interest revenue (amount of interest revenue expected from certificates of deposit and savings bank accounts compared to amounts actually deposited in Local Union No. 9's bank accounts from January 1970 through September 1981) — 76,000

g. Amount of cash collected by Local Union No. 9 which was not deposited into Local Union No. 9's bank accounts. This shortage is for the period from January 1975 through September 1981 — 75,863

$998,281

Because the above procedures were not sufficient to constitute an examination made in accordance with generally accepted auditing standards, we do not express an opinion on any of the specific amounts referred to above. Had

we performed additional procedures or had we made an examination of the financial statements in accordance with generally accepted auditing standards, matters might have come to our attention that would have been reported to you. This report should not be associated with the financial statements or the quarterly trustee reports of Sheet Metal Workers Local Union No. 9 for any periods between January 1970 through September 1981.

/s/ Arthur Young & Company

January 5, 1981

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 84-M-879

(Title omitted in printing)

ORDER GRANTING MOTION TO INTERVENE AND FOR JOINDER
(Filed Aug 7, 1985)

Upon consideration of the motion by Sheet Metal Workers International Association, Local No. 9 to intervene as a defendant, filed August 6, 1985, and the motion of that intervenor to join Sheet Metal Workers Local No. 9 Pension Fund, it is

ORDERED, that the motion to intervene is granted; the motion to join Sheet Metal Workers Local No. 9 Pension Fund is also granted, and the complaint by intervenor, tendered therewith, is ordered filed and to be served.

Dated: August 7, 1985

/s/ Richard P. Matsch

Richard P. Matsch, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 84-M-879

(Title omitted in printing)

COMPLAINT BY INTERVENOR

COMES NOW Intervenor, Sheet Metal Workers International Association, Local No. 9, and states the following claims pursuant to Rule 24(c) F.R.C.P.:

I.

JURISDICTION

1. This Court would have independent jurisdiction over Intervenor's claim pursuant to 29 U.S.C. § 501(b) and 28 U.S.C. § 1331. In any event, the Court's jurisdiction derives from its jurisdiction over the original action.

II.

NEW PARTIES

2. Sheet Metal Workers International Association, Local No. 9 (hereinafter Intervenor) is an unincorporated association operating in the State of Colorado and is a labor organization within the meaning of the National Labor Relations Act, 29 U.S.C. § 152(5)

3. The Sheet Metal Workers Local No. 9 Pension Fund is a joint labor management trust fund organized pursuant to Section 302(c) of the National Labor Relations Act (29 U.S.C. § 186(c)) for the purpose of providing retirement benefits for members of Sheet Metal Workers International Association, Local No. 9.

III.

FACTUAL BACKGROUND

4. Between 1964 and September 30, 1981, Curtis Guidry was chief executive officer of Intervenor. At pertinent times during this period, he held the title of business manager and financial secretary-treasurer of the Intervenor.

5. During the period between approximately 1964 and September 30, 1981, Plaintiff Guidry either singly or in concert with the bookkeeper for the union, one Agnes Short, committed various acts which were either designed to deprive or had the result of depriving the Intervenor of money which rightfully belonged to the Intervenor. As chief executive officer of the local union, Plaintiff either converted this money and property to his own use or knew of similar acts being committed by bookkeeper Agnes Short and did nothing to curtail them.

6. In an audit performed by Arthur Young & Company at the request of Intervenor, Arthur Young & Company concluded that from January, 1970 through September, 1981 a total of $998,281 had been stolen from Intervenor. Much of that money has not been recovered by Intervenor, and Intervenor has incurred substantial costs in collecting the money that it has recovered. A copy of the audit report is attached hereto and incorporated herein, which specifies the amounts stolen by Mr. Guidry and the methods utilized to steal during the stated period.

7. Upon information and belief, the Plaintiff deprived the Intervenor of property and money which

rightfully belonged to the Intervenor prior to January, 1970 in amounts unknown at the present time.

8. The Plaintiff concealed from the union all of the above misappropriations of funds, both by misrepresentation and by failure to disclose.

9. The actions of Plaintiff more fully set forth above have caused the union to incur special costs which they would not otherwise have incurred, including but not limited to costs for audits, retrieval of records, attorneys' fees and travel expenses.

10. On March 31, 1982, before Honorable Zita L. Weinshienk, Judge of the United States District Court for the District of Colorado, Plaintiff pled guilty to one count in violation of 29 U.S.C. §501(c). In that guilty plea, Plaintiff confessed to embezzling, stealing and unlawfully and willfully abstracting and converting to his own use $377,301.53 from the general account of the Intervenor between April 1, 1977 and September 30, 1981. Thereafter, Plaintiff was sentenced to serve the maximum sentence for his conviction by Judge Weinshienk.

11. At various times during Plaintiff's tenure as chief executive officer of the Intervenor, Intervenor made contributions in his behalf to three pension funds, the Sheet Metal Workers Local No. 9 Pension Fund, the Sheet Metal Workers National Pension Fund and the Sheet Metal Workers Local Unions and Councils Pension Plan (hereinafter referred to collectively as the Pension Funds).

12. Subsequent to discovery of his fraudulent activities, Plaintiff applied to all three Pension Funds for early retirement benefits.

13. The Sheet Metal Workers National Pension Fund and the Sheet Metal Workers Local Unions and Councils Pension Plan have refused to pay Plaintiff early retirement benefits resulting in Plaintiff's initiation of this action.

14. However, Sheet Metal Workers Local No. 9 Pension Fund began paying Plaintiff his early retirement benefits effective July 1, 1985. Said benefits amount to $645 per month.

IV.

FIRST CLAIM FOR RELIEF

15. Intervenor incorporates in this first claim paragraph 1-14 above as if fully set forth.

16. This first claim for relief is asserted against Plaintiff Curtis Guidry.

17. By virtue of the holding of the offices in the union Intervenor referred to above, Plaintiff Guidry occupied a position of fiduciary responsibility toward the union and the union's members with respect to their money and property under 29 U.S.C. §501.

18. Plaintiff Guidry has breached said fiduciary responsibility in ways, including but not limited to the following:

a. Failing to hold the money and property of Intervenor solely for the benefit of the organization and its members;

b. Failing to manage, invest and expend the same in accordance with the Constitution and Bylaws of

the Intervenor and any resolutions of the governing bodies adopted thereunder;

c. Dealing with Intervenor as an adverse party;

d. Failing to account to the Intervenor for profits received by Plaintiff in his embezzlements; and

e. Failing to disclose to the union embezzlements and conversions commited (sic) by others.

19. In committing the above acts, Plaintiff Guidry violated his fiduciary duties imposed by 29 U.S.C. §501(a).

V.

SECOND CLAIM FOR RELIEF

20. Intervenor incorporates in this second claim paragraphs 1-19 above as if fully set forth.

21. This second claim for relief is asserted against Plaintiff Curtis Guidry.

22. By the acts alleged above, Plaintiff Guidry converted the property of the Intervenor in that he did exercise unauthorized acts of dominion and control over the personal property of the Intervenor.

VI.

THIRD CLAIM FOR RELIEF

23. Intervenor incorporates in his third claim for relief paragraphs 1-22 above as if fully set forth.

24. This third claim for relief is asserted against Plaintiff Curtis Guidry.

25. Plaintiff Guidry committed actual fraud against the Intervenor by the acts set forth above in that those acts constituted a knowing concealment of material facts by Guidry made with intent to deceive Intervenor and to cause reliance thereon, and the Intervenor did reasonably rely upon said misrepresentations.

VII.

FOURTH CLAIM FOR RELIEF

26. Intervenor incorporates paragraphs 1-25 in this fourth claim for relief as if fully set forth.

27. This fourth claim for relief is asserted against Plaintiff Curtis Guidry.

28. Plaintiff Guidry is liable to the union for monies had and received in that Guidry received money which in good conscience and equity should be paid to the union.

VIII.

FIFTH CLAIM FOR RELIEF

29. Intervenor incorporates paragraphs 1-28 in this fifth claim for relief as if fully set forth.

30. This fifth claim for relief is asserted against Plaintiff Curtis Guidry.

31. Plaintiff Curtis Guidry was negligent in that he had a duty of reasonable care toward the union and did fail to exercise that care and to act as a reasonable person

would have to uncover the acts of conversion and fraud which were committed against the union.

IX.

SIXTH CLAIM FOR RELIEF

32. Intervenor incorporates paragraphs 1-31 above into this sixth claim for relief as if fully set forth.

33. This sixth claim for relief is asserted against Defendants Sheet Metal Workers National Pension Fund and Sheet Metal Workers Local Unions and Councils Pension Plan and furthermore is asserted against the Sheet Metal Workers Local No. 9 Pension Plan which Intervenor has moved to join as a party in this action pursuant to Rule 19 F.R.C.P. Additionally, this claim for relief is asserted against Plaintiff Curtis Guidry.

34. Plaintiff Guidry has made application to the Pension Funds for his pension benefits. In equity, said benefits should be paid to Intervenor or should be held in trust for Plaintiff Guidry until Intervenor has been made whole for all losses resulting from the acts of Guidry as alleged above.

35. In the exercise of its equitable powers, this Court must restrain and enjoin the Pension Funds from paying any further pension benefits to Plaintiff Guidry until the completion of this action and thereafter until Intervenor is made whole for its losses. Unless this Court exercises those powers, Intervenor will be irreparably harmed.

WHEREFORE, Intervenor prays for the following:

1. Judgment for damages against Plaintiff Guidry in an amount to be proven at trial;

2. An order requiring Defendant Guidry to pay to Intervenor all monies had and received which should, under equitable principles, have been paid to the union;

3. An order from the Court requiring Defendant Guidry to make an accounting in accordance with 29 U.S.C. §501(a) with respect to the money and property which he wrongfully and in breach of his fiduciary duty converted to his gain;

4. A temporary and permanent injunction against the Pension Funds prohibiting those Funds from making any further payments of pension benefits to Plaintiff Guidry unless and until Plaintiff Guidry makes the Intervenor whole for its losses;

5. Interest at the statutory maximum rate; and

6. Such other and further relief as this Court deems just and proper.

(Signature omitted in printing

(Certificate of Mailing omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 84M879

(Title omitted in printing)

ANSWER OF CURTIS GUIDRY TO
COMPLAINT OF INTERVENOR

COMES NOW Plaintiff, Curtis Guidry by and through undersigned counsel, to answer as follows pursuant to F.R.C.P. 8(b) and (c):

1. Plaintiff denies that this Court derives original jurisdiction over Intervenor's claims derivatively from Plaintiff's claims pursuant to 29 U.S.C. 1101 *et seq.* Plaintiff further denies that this Court has independent jurisdiction pursuant to 28 U.S.C. 1331 or 29 U.S.C. 501 (b).

2. Plaintiff admits the allegations of paragraphs 2 and 3.

3. Plaintiff admits that he was business manager of Intervenor from 1964 to September 30, 1981. Plaintiff affirmatively states he was financial secretary/treasurer of Intervenor from 1961 through September 30, 1981 and that he was chief executive officer of Intervenor from 1977 or 1978 through September 30, 1981. Plaintiff denies any other allegations of paragraph no. 4.

4. Plaintiff denies the allegations of paragraph no. 5, except that he affirmatively states that he pled guilty to violating 29 U.S.C. 501(c).

5. Plaintiff is without knowledge or information sufficient to form a belief as to the truth of and therefore denies:

(a) The contents of the audit report referred to in paragraph 6 and attached to Intervenor's Complaint; and,

(b) Whether much of the money has or has not been recovered by Intervenor and whether Intervenor has incurred substantial costs in collecting monies recovered and therefore denies the same.

With respect to the findings of the audit:

a. **Finding A:**

Plaintiff admits he did endorse certain checks written to the Central Bank of Denver for deposit to his personal bank account but is without knowledge or information sufficient to state the total amount of such checks or any other particular of such checks and therefore denies same:

b. **Finding B:**

Plaintiff admits that he deposited certain checks written to Intervenor by Local Union No. 9's Pension Trust and Welfare Fund to his personal bank account but is without knowledge or information sufficient to state the total amount of such checks or any other particular of such checks and therefore denies same;

c. Plaintiff denies theft of any of the items listed in paragraphs C and D on page 5 of the audit;

d. Plaintiff admits theft of certain certificates of deposit from Intervenor but is without knowledge or information sufficient to state

the amount of such certificates taken or any other particular of such certificates and therefore denies same.

e. Plaintiff is without knowledge or information sufficient to form a belief as to the truth of finding F on page 5 and therefore denies same;

f. Plaintiff denies taking any cash collected by Local 9 in finding G of the audit on page 5;

g. Plaintiff is without knowledge or information sufficient to form a belief as to the truth of all other matters contained in the audit report and therefore denies same.

6. Plaintiff is without knowledge or information sufficient to form a belief as to the truth of the remaining averments in paragraph 6 and therefore denies same.

7. Plaintiff is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 7 and therefore denies same.

8. Plaintiff admits that he did not disclose to Intervenor that he had deposited any Intervenor funds to his own benefit. Plaintiff denies the remainder of the averments of paragraph 8.

9. Plaintiff is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 9 and therefore denies same.

10. Piaintiff admits the averments of paragraph 10.

11. Plaintiff is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 11 and therefore denies same.

12. Plaintiff admits that he applied to all three named pension funds for pension benefits but denies the remainder of the averments of paragraph 12.

13. Plaintiff admits the allegations of paragraph 13.

14. Plaintiff admits the averments of paragraph 14 and affirmatively states that such payments were agreed to by Sheet Metal Workers' Local Union No. 9 Pension Fund pursuant to the terms and conditions of the Stipulated Confession of Judgment and Settlement Agreement entered into between Plaintiff and Sheet Metal Workers' Local No. 9 Health and Welfare Funds and Pension Fund. Specifically, the Pension Fund agreed at paragraph 3 to reinstate pension payments in consideration for payment of $20,000.00 to the Pension Fund and in consideration for his dismissal of the cross-claim against the Pension Fund for those benefits. A copy of that pleading is attached hereto, marked Exhibit "A" and incorporated by this reference.

15. The averments contained in paragraphs 15, 20, 23, 26, 29 and 32 are contained in responses throughout this Answer.

16. The allegations of paragraphs 16, 21, 24, 27, 30 and 33 identify Curtis Guidry to be the party to respond to subsequent paragraphs and so no response is required.

17. The allegations of paragraphs 17, 19, 28 and 35 are allegations of law and not averments to which response is required, however, to the extent that response is required, Plaintiff denies same.

18. The averments of paragraph 18 are denied except that Plaintiff admits he pled guilty to violating 29 U.S.C. 501(c).

19. Plaintiff admits he pled guilty to violating 29 U.S.C. 501(c) and denies the remainder of the averments of paragraph 22.

20. Plaintiff is without knowledge or information sufficient to form a belief as to the truth of the averments of fraud contained in paragraph 25 in part for the reason that have not been specifically pled in accordance with F.R.C.P. 9(b) and therefore denies same. Particularly, Plaintiff is without knowledge as to the specific material facts alleged to have been concealed from the Intervenor with the intent to cause Intervenor to rely and to which misrepresentations are alleged to have been relied upon by the Intervenor and therefore denies same.

21. The averments of paragraph 31 are denied.

22. Regarding the averments of paragraph 34, Plaintiff admits he made application to all three named pension funds for pension benefits. The remainder of the allegations of paragraph 34 are allegations of matters of law and not averments to which response is required, however, to the extent that response is required, they are denied.

FIRST AFFIRMATIVE DEFENSE

Intervenor's Complaint fails to state a claim upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

Intervenor has failed to mitigate its damages.

THIRD AFFIRMATIVE DEFENSE

Intervenor's claims are barred by the applicable statute of limitations, including but not limited to, Sec. 13-80-107, 108, 109, 110, C.R.S.

FOURTH AFFIRMATIVE DEFENSE

Intervenor has waived its claims and is barred from asserting them against Plaintiff.

FIFTH AFFIRMATIVE DEFENSE

Intervenor's claims are barred or reduced by comparative negligence of Intervenor.

SIXTH AFFIRMATIVE DEFENSE

Intervenor's claims are barred by the doctrine of estoppel.

SEVENTH AFFIRMATIVE DEFENSE

Intervenor's claims are barred by the doctrine of laches.

EIGHTH AFFIRMATIVE DEFENSE

This Court lacks subject matter jurisdiction over Intervenor's claims for the reason that no statutory basis

pled by Intervenor confers jurisdiction over the claims pled.

WHEREFORE, Plaintiff having fully answered the Complaint of the Intervenor, prays that Intervenor's Complaint be dismissed and held for naught, that he have his costs of suit, including reasonable expert witness fees and attorney's fees, and for such other and further legal or equitable relief which as to the Court seems just and proper.

Respectfully submitted this 12 day of September, 1985.

(Signature omitted in printing)

(Certificate of mailing omitted in printing)

Exhibit "A"

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Case No. 82-CV-3128, Courtroom 8

STIPULATED CONFESSION OF JUDGMENT AND SETTLEMENT AGREEMENT

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL NO. 9,

Plaintiff,

vs.

SHEET METAL WORKERS' LOCAL NO. 9 PENSION FUND, et al.,

Defendants and Third-Party Plaintiffs,

vs.

CURTIS GUIDRY, et al.,

Third-Party Defendants.

Defendants and third-party plaintiffs Sheet Metal Workers' Local No. 9 Health and Welfare Fund ("Welfare Fund") and Sheet Metal Workers' Local No. 9 Pension Fund ("Pension Fund") and third-party defendant Curtis Guidry ("Guidry"), by their undersigned attorneys, hereby stipulate and agree as follows with respect to the claims asserted by and between said parties in the instant action:

WHEREAS, the Welfare Fund and the Pension Fund claim against Guidry in the instant action that he was responsible for excess monies paid by the Welfare Fund and the Pension Fund for administrative services provided to the Welfare Fund and the Pension Fund by plaintiff herein, all in the amount of $85,176.00; and

WHEREAS, the Welfare Fund and the Pension Fund claim against Guidry in the instant action that he is liable to them as third-party defendant for the $75,000.00 sum paid to the plaintiff herein in settlement of its claims, on or about January, 1984; and

WHEREAS, the Welfare Fund and the Pension Fund claim against Guidry in the instant action for legal expenses incurred by the Welfare Fund and the Pension Fund in defense of plaintiff's claims herein, all in the amount of $45,026.26; and

WHEREAS, Guidry claims against the Pension Fund in the instant action for his benefits due him from the Pension Fund under the Employee Retirement Income Security Act of 1974 ("ERISA"); and

WHEREAS, Guidry has vested in his ERISA pension with the Pension Fund in the amount of $645.00 a month; and

WHEREAS, the Pension Fund ceased making payments to Guidry in May, 1982, and is holding in the name of Guidry, to date, the accrued sum of $23,865.00 for his ERISA fund; and

WHEREAS, the Welfare Fund, the Pension Fund, and Guidry desire to resolve their claims herein;

NOW THEREFORE, it is hereby mutually agreed:

1. That Guidry stipulates and consents to the entry of Judgment against him and in favor of the Welfare Fund and the Pension Fund in the amount of $205,202.26.

2. The Welfare Fund and the Pension Fund Stipulate and consent to a stay of execution of the judgment consented to by Guidry in paragraph 1 above, for a period of ninety (90) days from the date upon which the Court herein enters Judgment pursuant to this Stipulation, and pending the entry of a Satisfaction of Judgment, stipulated and agreed to below.

3. The Pension Fund stipulates and consents to the reinstatement of payments to Guidry from his ERISA pension fund, commencing as of June, 1985, and to the payment to Guidry of $3,865.00 out of the accrued sums held by the Pension Fund in the name of Guidry.

4. Guidry stipulates and consents to the payment of the $20,000.00 balance held by the Pension Fund in the name of Guidry to the order of The American Insurance Company, the insurance carrier for the Welfare Fund and the Pension Fund on their fidelity bond.

5. Upon disbursement of the funds referred to in paragraph 4, the Welfare Fund and the Pension Fund will execute and file a Satisfaction of the Judgment stipulated and consented to in paragraph 1, above.

6. Also upon disbursement of the funds referred to in paragraph 4 above, The American Insurance Company will deliver to Guidry a complete Release of all claims it has or may have in connection with the activities of Guidry as an employee and/or trustee of the Pension Fund and the Welfare Fund, in the instant action.

7. Upon the resumption of ERISA benefits and the payment of the funds referred to in paragraph 3 above, it is hereby stipulated and agreed that the crossclaim by Guidry against the Pension Fund for such ERISA benefits may be dismissed, with prejudice and on the merits.

8. It is hereby expressly understood by the parties to this Stipulation, that its terms encompass the complete resolution of all claims asserted in the instant action between the parties herein, and that each party shall bear its own costs.

Dated this 28th day of May, 1985.

(Signatures omitted in printing)

UNITED STATES DISTRICT COURT
STATE OF COLORADO

Civil Action No. 84-M-879

(Title omitted in printing)

ANSWER TO INTERVENOR'S COMPLAINT

COMES NOW the Defendants Sheet Metal Workers' Local Unions and Councils Pension Plan, and its Trustees, Edward J. Carlough, Cecil D. Clay, George J. Cuddihy, Urie E. Williams, Jr., and Richard J. Scott (hereinafter referred to collectively as the Defendants), by and through the undersigned Counsel answer the complaint and allege as follows:

FIRST DEFENSE

1. The allegations contained in paragraphs nos. 1 through 33 are admitted.

2. The allegations contained in paragraph no. 34 that "Plaintiff Guidry has made application to the Pension Funds for his pension benefits" is admitted. The remaining allegations of paragraph no. 34 are denied in that they assume that a benefit is payable to Guidry from the Defendants. However, if a finding is made that a benefit is payable, the Defendants admit that said benefit "should be paid to Intervenor or should be held in trust for Plaintiff Guidry until Intervenor has been made whole for all losses resulting from the acts of Guidry as alleged above."

3. With respect to the allegations contained in paragraph no. 35, said allegations have no relevance to these Defendants in that these Defendants have never paid any pension benefits to the Plaintiff.

4. With respect to the prayer for relief, these Defendants admit that the Intervenor is entitled to each form of relief requested therein from the Plaintiff but deny that the Intervenor is entitled to any relief from these Defendants but for that set forth in the "Second Defense" below.

SECOND DEFENSE

The Defendants deny that the Plaintiff has accrued a right to a pension benefit and maintain that all contributions made by the Intervenor on behalf of the Plaintiff were made in error and should be returned to the Intervenor.

THIRD DEFENSE

In the alternative, the Defendants maintain that, if the Plaintiff is found to have accrued a right to a pension benefit and if the Court finds that said benefit should be paid to the Intervenor, that benefit should be paid to the Intervenor in a lump sum calculated pursuant to generally accepted actuarial standards.

(Signatures omitted in printing)

UNITED STATES DISTRICT COURT
STATE OF COLORADO

Civil Action No. 84-M-879

(Title omitted in printing)

ANSWER TO INTERVENOR'S COMPLAINT

COMES NOW the Defendants Sheet Metal Workers' National Pension Fund, and its Trustees, Edward J. Carlough, Robert T. Stringer, C. T. Roff, and Cavet Snyder (hereinafter referred to collectively as the Defendants), by and through the undersigned Counsel answer the complaint and allege as follows:

FIRST DEFENSE

1. The allegations contained in paragraphs nos. 1 through 33 are admitted.

2. The allegations contained in paragraph no. 34 that "Plaintiff Guidry has made application to the Pension Funds for his pension benefits" is admitted. The remaining allegations of paragraph no. 34 are denied in that they assume that a benefit is payable to Guidry from the Defendants. However, if a finding is made that a benefit is payable, the Defendants admit that said benefit "should be paid to Intervenor or should be held in trust for Plaintiff Guidry until Intervenor has been made whole for all losses resulting from the acts of Guidry as alleged above."

3. With respect to the allegations contained in paragraph no. 35, said allegations have no relevance to these

Defendants in that these Defendants have never paid any pension benefits to the Plaintiff.

4. With respect to the prayer for relief, these Defendants admit that the Intervenor is entitled to each form of relief requested therein from the Plaintiff but deny that the Intervenor is entitled to any relief from these Defendants but for that set forth in the "Second Defense" below.

SECOND DEFENSE

The Defendants deny that the plaintiff has accrued a right to a pension benefit and maintain that all contributions made by the Intervenor on behalf of the Plaintiff were made in error and should be returned to the Intervenor.

THIRD DEFENSE

In the alternative, the Defendants maintain that, if the Plaintiff is found to have accrued a right to a pension benefit and if the Court finds that said benefit should be paid to the Intervenor, that benefit should be paid to the Intervenor in a lump sum calculated pursuant to generally accepted actuarial standards.

(Signatures omitted in printing)

UNITED STATES DISTRICT COURT
STATE OF COLORADO

Civil Action No. 84-M-879

(Title omitted in printing)

ANSWER TO INTERVENOR'S COMPLAINT

COMES NOW the Defendant Sheet Metal Workers Local No. 9 Pension Fund, by and through the undersigned Counsel answers the complaint and alleges as follows:

1. The allegations contained in paragraphs nos. 1 through 35 are admitted.

(Signatures omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 84-M-879

(Title omitted in printing)

STIPULATION FOR ENTRY OF JUDGMENT

COME NOW Curtis Guidry, Plaintiff, and Sheet Metal Workers' International Association, Local No. 9, Intervenor, through their respective counsel, and do hereby stipulate to the entry of judgment as follows:

1. The parties, in an effort to resolve some of the outstanding disputes between them, have entered into a Settlement Agreement and Release dated January 8, 1986, which is attached hereto and incorporated herein by reference. Pursuant to said Settlement Agreement and Release, the parties do hereby stipulate to entry of judgment on the first five claims for relief in the Complaint by Intervenor in the amount of Two Hundred Seventy-Five Thousand and 00/100 Dollars ($275,000.00).

2. The parties stipulate that interest shall accrue on said judgment in the amount of eight percent (8%) per annum, compounded annually.

3. Both parties do hereby waive their right to appeal the judgment entered in accordance with paragraph 1 of this Stipulation to any other court.

WHEREFORE, the parties pray that this Court enter judgment on the first five claims for relief in the Complaint by Intervenor in the amount of Two Hundred Seventy-Five Thousand and 00/100 Dollars ($275,000.00)

against Plaintiff Curtis Guidry and in favor of Intervenor Sheet Metal Workers' International Association, Local No. 9, with interest to accrue on said judgment at the rate of eight percent (8%) per annum, compounded annually.

(Signatures omitted in printing)

(Certificate of mailing omitted in printing)

SETTLEMENT AGREEMENT AND RELEASE

THIS AGREEMENT is entered into as of January 9th, 1986 by Sheet Metal Workers' International Association, Local No. 9 (the "Union") and Curtis Guidry ("Guidry").

RECITALS

A. On January 2, 1981, the Union, as plaintiff, commenced an action against Guidry and others, as defendants, in the District Court of the City and County of Denver, State of Colorado, Civil Action No. 81-CV-10374 (the state court action). In the state court action, the Union sought damages against Guidry for unauthorized acts of dominion and control over the personal property of the Union, actual fraud, conspiracy, conversion, monies had and received, negligence, constructive fraud and breach of fiduciary duty.

B. On or about August 7, 1985, the Union filed a complaint by intervenor against Guidry and others in the United States District Court for the District of Colorado, Civil Action No. 84-M-879 (the federal court action), in which the Union asserted five claims for relief against

Guidry alleging breach of fiduciary duty under 29 U.S.C. §501, conversion, actual fraud, monies had and received and negligence. In a sixth claim for relief against all other parties, the Union sought the exercise of the court's equitable jurisdiction to prevent Guidry from obtaining his pension benefits from the three pension fund defendants in that case unless and until the Union was made whole for all losses resulting from Guidry's unlawful acts.

C. The parties enter into this Agreement to resolve and completely dispose of the disputes between the parties presently being litigated in the state court action and in the first five claims for relief in the complaint by intervenor filed in the federal court action. However, the parties reserve their rights to assert all good faith claims and defenses relating to the Union's attempts to satisfy Guidry's liability by obtaining the benefits from Guidry's pensions and otherwise.

AGREEMENT AND RELEASE

For valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Union and Guidry agree as follows:

1. *Entry of judgment*. The parties shall stipulate in writing simultaneously with execution of this Agreement to entry of judgment in the federal court action against Guidry in the amount of Two Hundred Seventy-Five Thousand and 00/100 Dollars ($275,000.00) based upon the first five claims for relief in the complaint by intervenor. Both parties waive their right to appeal this entry of judgment on said claims and further waive all rights to litigate said claims further.

2. *Dismissal of state court action against Guidry*. After entry of judgment in the federal court action as provided for in the stipulation referred to in paragraph 1 above, the Union shall move to dismiss the Union's claims against Guidry in the state court action. Said dismissal shall be with prejudice, subject to the accuracy of Guidry's attestations and representations regarding his assets as provided in paragraph 4 of this Settlement Agreement. Each party shall pay its costs and attorneys' fees in the state court action.

3. *Motion for final judgment pursuant to Rule 54(b)*. With the stipulation for entry of judgment in the federal action referred to in paragraph 1 above, the Union shall file a motion to direct entry of final judgment on the first five claims for relief in the complaint by intervenor in the federal court action pursuant to Rule 54(b) of the Federal Rules of Civil Procedure requesting an express determination by the court that there is no just reason for delay in the entry of final judgment and further requesting express direction from the court for entry of judgment against Guidry in the amount of Two Hundred Seventy-Five Thousand and 00/100 Dollars ($275,000.00). The Union shall have the right to state in said motion that Guidry has no objection to the entry of final judgment pursuant to Rule 54(b) on the first five claims for relief in the complaint by intervenor, and Guidry, through his counsel or otherwise, shall convey no such objection to the court.

4. *Guidry's representations regarding assets*. By signing this Settlement Agreement and the verification which appears at the conclusion hereof, Guidry attests and represents that he has no remaining assets as of the date of

signing this Agreement which derive, either directly or indirectly, from his embezzlement of funds from the Union. The Union, in entering into this Settlement Agreement, relies upon the accuracy of this representation. If this attestation and representation is not true, the Union may, at its option, rescind this Settlement Agreement and reinstate the claims asserted in the state court action and claims for relief one through five in the federal court action retroactively to the date of the original filing of the respective claims or may seek damages for its detrimental reliance upon the truth of this representation.

5. *Entry of judgment for fraud while acting in fiduciary capacity and embezzlement.* The parties do hereby agree that the entry of judgment referred to in paragraph 1 hereof is in consideration for money obtained by Guidry in the commission of actual fraud while acting in a fiduciary capacity for the Union, which money was embezzled by Guidry. In factual support of this Agreement, the parties refer to Guidry's plea of guilty to embezzling, stealing and unlawfully and willfully abstracting and converting to his own use Three Hundred Seventy-Seven Thousand Three Hundred Six and 53/100 Dollars ($377,306.53) from the Union in violation of 29 U.S.C. §501(c). This guilty plea was entered in Case No. 82-CR-71 in the United States District Court for the District of Colorado on March 31, 1982. Guidry was convicted and sentenced to the maximum sentence allowed by law based upon this plea.

6. *Interest.* The parties do hereby agree that interest will run on the judgment entered pursuant to the stipulation referred to in paragraph 1 hereof at the rate of eight percent (8%) per annum, compounded annually. Should

this provision 6 be construed as invalid, post-judgment interest shall be at the rate prescribed in 29 U.S.C. §1961 so long as that rate is seven percent (7%) or greater. If less than seven percent (7%), this Agreement shall be null and void and the parties returned to their respective positions prior to the execution hereof.

7. *Releases.*

a. The Union hereby releases Guidry from any and all claims, causes of action, counterclaims, cross-claims, third-party claims, debts, covenants, contracts, promises, agreements, liabilities, losses, expenses and attorneys' fees arising out of or in any way connected to his employment by the Union or to any actions or defalcalations (sic) committed by him while so employed. This release, however, is conditioned upon the accuracy of the attestations and representations made in paragraph 4 hereof. Furthermore, the parties agree that this release does not constrain the Union from taking actions in good faith to obtain the proceeds of Guidry's pensions by prosecuting the sixth claim for relief in the complaint by intervenor in the federal court action, by taking good faith actions to collect the judgment, the entry of which is stipulated to in paragraph 1 hereof, or otherwise.

b. Guidry hereby releases and discharges the Union and each and every one of the Union's present and former officers, employees and members from any and all obligations, claims, counterclaims, cross-claims, third-party claims, debts, covenants, contracts, promises, agreements, liabilities, losses, expenses, attorneys' fees and actions and causes of action which he has or may have against the Union or the others referred to above, except

insofar as such parties are already sued in the federal action.

8. *Claims for pension benefits.* The parties understand and agree that the Union has attempted to obtain the proceeds of plaintiff's alleged pensions from the three pension funds named as defendants in the federal court action. Such attempts or defenses thereto are made in good faith, and each party has the right to make such attempts and assert defenses thereto in good faith without liability to the other party for so doing.

9. *No other release.* The parties understand and intend that this Agreement does not in any way release any party other than Guidry in either the state or the federal court action from liability to the Union.

10. *Entire agreement.* This Agreement constitutes the entire agreement of the parties and may not be changed except in writing subscribed by an authorized representative of both parties.

11. *Counterparts.* This Agreement may be executed in counterparts, each of which shall have full force and effect.

APPROVED AS TO FORM:

(Signatures omitted in printing)

(Jurat omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 84-M-879

(Title omitted in printing)

JUDGMENT

(Filed Jan 14, 1986)

Pursuant to the Order for Entry of Judgment dated the 14th day of January, 1986 and signed by the Honorable Judge Richard P. Matsch, it is hereby ORDERED as follows:

1. Judgment is entered for Sheet Metal Workers' International Association, Local No. 9, Intervenor, and against Curtis Guidry, Plaintiff, in the amount of Two Hundred Seventy-Five Thousand and 00/100 Dollars ($275,000.00) on the first five claims in the Complaint by Intervenor, only, pursuant to Rule 54(b), F.R.C.P., the Court having expressly determined that there is no just reason for delay and having expressly directed the entry of judgment pursuant to that rule.

2. Interest on said judgment shall accrue at the rate of 7.57% per annum, compounded annually.

3. Each party shall bear its or his own costs and attorneys' fees.

DATED this 14th day of January, 1986.

FOR THE COURT:

/s/ James R. Manspeaker
James R. Manspeaker, Clerk

APPROVED BY:

/s/ Richard P. Matsch
Richard P. Matsch
U. S. District Court Judge

(Italicized items are not part of the pre-printed form.)

United States District Court
DISTRICT OF COLORADO

(C.R.C.P. No. 26) **CASE NO.** *84-M-879*

WRITE OF CONTINUING GARNISHMENT

Curtis Guidry,
Plaintiff(s)

vs.

Sheet Metal National Pension Fund, et al., Defendants, and Sheet Metal International Assoc., Local No. 9, Intervenor and Sheet Metal Workers' Local No. 9 Pension Fund, Party under Rule 19, F.R.C.P.

XDefendant(s)X

Judgment Debtor's name, last known address, other identifying information: *Curtis Guidry, 1585 Dudley Street, Apartment 5A, Lakewood, CO 80215*

1. Original Amount of Judgment Entered *January 14, 1986* (date)	$	*275,000.00*
2. Plus any Interest Due on Judgment (*7.57* % per annum)	+ $	*741.44*
3. Taxable Costs (including estimated cost of service of this Writ)	+ $	*25.00*
4. Less any Amount Paid	- $	
5. Principal Balance/Total Amount Due and Owing	= $	*275,766.44*

I affirm that I am authorized to act for the Judgment Creditor and that this is a true and correct statement as of *1/27/86* .
(date)

Subscribed under oath before me on *1/27/86*

/s/ Phyllis T. Quinn
Notary Public or Deputy Clerk
1563 Gaylord St., Denver, CO 80206
My Commission Expires: *February 2, 1989*

BRAUER & BUESCHER, P.C.
/s/ Joseph M. Goldhammer
Signature (Type Name, Title, Address and Phone below)
Joseph M. Goldhammer, #5761
Attorney for Intervenor
1563 Gaylord Street
Denver, CO 80206/
(303) 333-7751

WRITT OF CONTINUING GARNISHMENT

To the United States Marshal or to the Sheriff of _____ County, or to any other person over the age of 18 years not a party to this action.

You are directed to serve TWO COPIES of this Writ of Continuing Garnishment upon *Sheet Metal Workers Local No. 9 Pension Fund, c/o Pamela M. Martin, Esq., 445 Union Blvd., #123, Lakewood Colorado 80228*. Garnishee, with proper return of service to be made to the Court.

TO THE GARNISHEE:

YOU ARE HEREBY SUMMONED AS GARNISHEE IN THIS ACTION AND ORDERED:

a. To answer the following questions under oath and to file your answers with the Clerk of the Court no less than 5 nor more than 10 days following the time you pay the Judgment Debtor for the first time following service of this Writ of Continuing Garnishment, or 40 days following service of this Writ upon you, whichever is less. YOUR FAILURE TO ANSWER THIS WRIT OF CONTINUING GARNISHMENT WILL RESULT IN THE ENTRY OF A DEFAULT AGAINST YOU.

b. To pay any nonexempt earnings to the Clerk of the Court no less than 5 nor more than 10 days following each time you pay the Judgment Debtor (employee) during the effective period of this Writ and attach a copy of the Calculation of the Amount of Exempt Earnings used (the calculation under "Questions to be Answered by Garnishee" should be used for the first pay period, and one of the multiple calculation forms included with this Writ should be used for all subsequent pay periods).

c. To deliver a copy of this Writ of Continuing Garnishment, together with the Calculation of the Amount of Exempt Earnings, at the first time you pay the Judgment Debtor (employee).

d. To deliver a copy of each subsequent Calculation of the Amount of Exempt Earnings each time you pay the Judgment Debtor (employee) for the remainder of the effective period.

e. MAKE CHECKS PAYABLE AND MAIL TO THE CLERK OF THE *U.S. DISTRICT* COURT AT *1929 Stout Street Denver, CO 80294*. PLEASE PUT THE CASE NUMBER (shown above) ON THE CHECK.

JAMES R. MANSPEAKER
CLERK OF THE COURT
(SEE REVERSE SIDE)

BY: *Illegible Signature*
Deputy Clerk
DATE: *1/27/86*

YOU ARE NOTIFIED (Employer also read "Notice to Judgment Debtor" below)

a. This Writ of Continuing Garnishment applies to all nonexempt earnings owed or owing during the 90 days following service of this Writ or until you have paid to the Clerk of the Court the amount shown on Line 5 on the front of this Writ, whichever occurs first. However, if you have already been served with a Writ of Continuing Garnishment or Writ of Garnishment for Child

Support, this new Writ is effective for the 90 days after any prior Writ terminates.

b. The following portion of any wages, salaries or commissions garnished is exempt from this Writ of Continuing Garnishment (See "Exemption Chart" below).

c. In no case may you withhold any amount greater than the Principal Balance Total Amount Due and Owing (Line 5 on the front of this Writ)

QUESTIONS TO BE ANSWERED BY GARNISHEE

The following questions MUST be answered by you under oath:

a. On the date and time this Writ of Continuing Garnishment was served upon you, was the Judgment Debtor employed by you?
___ YES __X__ NO
If YES, state how the Judgment Debtor is paid:
___ weekly ___ bi-weekly ___ semi-montly
___ monthly ___ other
The Judgment Debtor will be paid on the following dates during the 90 day effective period
_____

b. Are you under one or more Writs of Continuing Garnishment or Writ of Garnishment for Child Support against the Judgment Debtor?
___ YES __X__ NO
If YES, state the date on which all such Writs are expected to terminate _____

c. If the Judgment Debtor is employed and you answered NO to question b. complete the following calculation for the "first pay period" following service of this Writ. **See attached sheet for additional questions to be answered by garnishee.*

CALCULATION OF THE AMOUNT OF EXEMPT EARNINGS (First Pay Period)

Gross Pay for the First Pay Period from ___ thru ___	$ _____
Less Deductions Required by Law (For Example, Withholding Taxes, FICA)	- $ _____
Disposable Earnings (Gross Pay less Deductions)	= $ _____
Less Statutory Exemption (Use Exemption Chart Below)	- $ _____
AMOUNT TO BE WITHHELD AND PAID TO THE CLERK OF THE COURT	= $ _____

EXEMPTION CHART

PAY PERIOD	AMOUNT EXEMPT IS GREATER OF
Weekly	30 x Federal Minimum Hourly Wage or 75% of Disposable Earnings
Bi-weekly	60 x Federal Minimum Hourly Wage or 75% of Disposable Earnings
Semi-monthly	65 x Federal Minimum Hourly Wage or 75% of Disposable Earnings
Monthly	130 x Federal Minimum Hourly Wage or 75% of Disposable Earnings

I declare, under oath, that I am authorized to act for the Garnishee in this action, that the above answers are true and correct, and that I have delivered a copy of this Writ, together with the Calculation of the Amount of Exempt Earnings, to the Judgment Debtor at the time earnings were paid for the above First Pay Period (if earnings were paid).

Subscribed under oath before me on _____ (date)

_____
Signature
(Type Name, Title, Address and Phone below)

_____
Notary Public

My Commission Expires: _____

NOTICE TO JUDGMENT DEBTOR

A. Your employer may only withhold nonexempt earnings from your wages, salaries or commissions, but in no event more than the Principal Balance/Total Amount Due and Owing (Line 5 on the front of this Writ).

B. If you disagree with the amount withheld, you must make a good faith effort to talk to your employer within 5 days after being paid.

C. If you cannot settle the disagreement with your employer, you may file a written objection with the Clerk of the Court issuing this Writ within 10 days after being paid, stating, under oath, the specific mistake in the Calculation of the Amount of Exempt Earnings. YOU MUST USE AN APPROVED FORM which may be obtained from the Clerk of the Court.

D. You are entitled to a court hearing on your written objection to the Calculation of the Amount of Exempt Earnings.

E. Your employer cannot fire you because your earnings have been garnished. If your employer discharges you in violation of your legal rights, you may, within 90 days, bring a civil action for the recovery of wages lost because you were fired and for an order requiring that you be reinstated. Damages will be your lost wages, not to exceed six weeks, costs and reasonable attorney's fees.

RETURN OF SERVICE

STATE OF COLORADO ___ County of ___
I, ___, swear or affirm that I served two copies of the Writ

of Continuing Garnishment on ___ (date), at ___ (time), by _____.

Subscribed under oath before me on _____ (date)

_____ Signature

_____ My Commission Expires: ___
Notary Public Service Fee $___

MAKE YOUR CHECK PAYABLE TO THE CLERK OF THE COURT. SHOW CASE NUMBER ON YOUR CHECK. SEND ANSWER, AND CHECK, IF APPLICABLE, TO CLERK OF THE COURT:

Court Address: United States Courthouse
Denver, CO 80294

ADDITIONAL QUESTIONS TO BE ANSWERED BY GARNISHEE

The following questions MUST be answered by you under oath:

a. On the date and time this Writ of Continuing Garnishment was served upon you, did you hold or possess any personal property owed to or owned by the Judgment Debtor?

___ YES X[1] NO

b. If YES, list all items of personal property (including money), and their location(s) (Attach additional pages if necessary) _____

I declare, under oath, that I am authorized to act for the Garnishnee in this action and that the above answers are true and correct.

/s/ Raymond J. Sweeney
Signature
Type Name, Title, Address and Phone

Number
Raymond J. Sweeney, Counsel
1150 17th Street, N.W.
Washington, D.C. 20036
202/296-7002

Subscribed under oath before me on March 11, 1986
Date

/s/ Burnette Scarboro
Notary Public

My Commission expires: 4/15/1991

1/ For purposes of this Writ, the Garnishee denies that it "possesses any personal property owed to or owned by the Judgment Debtor" in light of the Court's comments indicating that it has equitable power to determine the distribution of all pension funds in question.

(C.R.C.P. No. 27)

UNITED STATES DISTRICT COURT for the DISTRICT OF COLORADO
/_/ COURT /_/ COUNTY/ _/ /COLORADO /

Case No. ___ Div./Ct. Rm. ___

CALCULATION OF THE AMOUNT OF EXEMPT EARNINGS

Plaintiff(s)
vs.

Defendant(s)

Judgment Debtor's Name _____

Gross Pay for _____ thru _____	$ _____
Less Deductions	- $ _____
Disposable Earnings	= $ _____
Less Statutory Exemption	- $ _____
AMOUNT PAID TO COURT	= $ _____

I certify that I am authorized to act for the Garnishee in this action, that the above Calculation is true and correct, and that I have delivered a copy of this Calculation to the Judgment Debtor at the time earnings were paid for the above Pay Period.

Date: _____ _____
Signature

TEAR ALONG PERFORATED LINE AND MAIL WITH EACH CHECK TO CLERK OF THE COURT

• • •

(Three identical CALCULATION OF THE AMOUNT OF EXEMPT EARNINGS forms have been omitted.)

No. 1141. CALCULATION OF THE AMOUNT OF EXEMPT EARNINGS Bradford Publishing, 5825 W. 6th Ave., Lakewood, CA 80214 – (303) 233-6900

Send original to Clerk of the Court and give copy to Debtor

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 84-M-879

(Title omitted in printing)

TRAVERSE AND MOTION FOR HEARING TO ANSWERS TO WRIT OF CONTINUING GARNISHMENT FILED BY SHEET METAL WORKERS' LOCAL NO. 9 PENSION FUND

COMES NOW the Sheet Metal Workers' International Association, Local No. 9, Intervenor/Judgment Creditor, and traverses the answer filed by the Garnishee above-named and moves this Court for hearing, to-wit:

1. Intervenor/Judgment Creditor, upon information and belief, states that the writ of continuing garnishment answered by the Garnishee was not answered correctly in that Garnishee owes a pension to Plaintiff/Judgment Debtor Curtis Guidry, which pension is garnishable pursuant to federal law.

WHEREFORE, Intervenor/Judgment Creditor prays this Court to set the within traverse for hearing.

(Signature omitted in printing)

(Jurat omitted in printing)

(Certificate of mailing omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 84-M-879

(Title omitted in printing)

MOTION FOR SUMMARY JUDGMENT ON SIXTH CLAIM FOR RELIEF BY INTERVENOR
(Filed April 23, 1986)

COME NOW Sheet Metal Workers' International Association, Local No. 9 ("Local 9"), Intervenor in the above-captioned action, and hereby moves this Court pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment on its sixth claim for relief as follows: an order declaring that Plaintiff Curtis Guidry is entitled to receive pension benefits from Defendants Sheet Metal Workers' National Pension Fund, Sheet Metal Workers' Local Unions and Councils Pension Plan and from Rule 19 party, Sheet Metal Workers' Local No. 9 Pension Plan, and a further order imposing a constructive trust in favor of Local 9 upon those pension benefits such that those benefits shall be paid directly to Local 9 up to $275,000, plus accrued interest from the date of entry of judgment on the first five claims for relief. January 14, 1986, at the rate of 7.57% per annum, compounded annually until such time as the full principal plus accrued interest shall have been paid to Local 9.

In support of this Motion, Local 9 states the following:

1. There are no material disputed issues of fact.

2. Local 9 is entitled to the judgment sought as a matter of law.

Local 9 bases this Motion upon the pleadings, upon the affidavits of William F. Stephens submitted in this action and exhibits attached thereto and upon the Brief in Support of Motion for Summary Judgment filed herewith.

WHEREFORE, Local 9 respectfully requests that the Court enter an order declaring that Plaintiff herein, Curtis Guidry, is entitled to pension benefits from the Sheet Metal Workers' National Pension Fund, the Sheet Metal Workers' Local Unions and Councils Pension Plan and the Sheet Metal Workers' Local No. 9 Pension Plan and further ordering that any such pension monies up to $275,000, plus accrued interest at the rate of 7.57% per annum, from the date of the judgment on the first five claims for relief, January 14, 1986, compounded annually until such time as full principal and accrued interest shall have been paid shall be held in constructive trust for Local 9 and paid to local 9 as it would otherwise fall due to Plaintiff Guidry, including any benefits which have accrued through the date of entry of judgment.

(Signature omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 84-M-879

(Title omitted in printing)

SECOND AFFIDAVIT OF WILLIAM F. STEPHENS

COMES NOW William F. Stephens who, being duly sworn, deposes and says:

1. I am the same William F. Stephens who previously gave my Affidavit in this case which was submitted to the Court with the Brief of Defendants in support of their Motion to Dismiss or, in the Alternative, for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment. That Affidavit was submitted to the Court on or about July 16, 1985. All of the statements in my original Affidavit remain true at this time.

2. Attached hereto as Exhibits A and B are the reporter's transcript and prosecutor's statement of a providency hearing held on March 31, 1982 in Criminal Action No. 82-CR-71 in the United States District Court for the District of Colorado, *United States of America v. Curtis Guidry*. At that hearing, Guidry pled guilty to embezzling a total of $377,301.53 from Sheet Metal Workers' International Association, Local No. 9 in violation of 29 U.S.C. § 501(c).

3. At the present time, Guidry has no dependents, is in good health and is gainfully employed, having already been released from prison after having been sentenced for his guilty plea referred to above.

4. At the time Guidry resigned as chief executive officer of the Union on September 30, 1981, the Union's cash assets were reduced to $150,000.00 nearly rendering the large Union operation insolvent. At that time, the Union commissioned an audit to be performed by Arthur Young & Company which showed that $998,281.00 was missing and unaccounted for from the Union for the

period January, 1970 through September, 1981. A copy of the audit report is attached to my first Affidavit in this action.

5. The Sheet Metal Workers' Local No. 9 Pension Fund (the Rule 19 Party in this case) is a joint labor management trust fund organized pursuant to § 302(c) of the National Labor Relations Act (29 U.S.C. § 186(c)) for the purpose of providing retirement benefits for members of Sheet Metal Workers' International Association, Local No. 9. The only contributors to that fund are Local 9 itself and employers having collective bargaining agreements with Local 9. If Local 9 did not exist, the trust fund would have no contributors and hence would not exist also.

6. From at least 1977 through September 30, 1981, Guidry used his office as Trustee of the Local No. 9 Pension Fund to steal money en route from the Pension Fund to the Union, which money is referred to in paragraphs 4 and 5 of the prosecutor's statement attached hereto as Exhibit B. That money was being transferred to the Union to pay the Union for administrative services rendered to the Trust Funds.

Further Affiant sayeth not.

(Signature omitted in printing)

(Jurat omitted in printing)

(Certificate of mailing omitted in printing)

Exhibit A

(p. 1) IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 82-CR-71

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	*REPORTER'S TRANSCRIPT*
vs.	)	(Providency Hearing)
CURTIS GUIDRY,	)	
Defendant.	)	

Proceedings before the HONORABLE ZITA L. WEINSHIENK, Judge, United States District Court for the District of Colorado commencing at 1:00 a.m. on the 31st day of March, 1982, in Courtroom C-204, United States Courthouse, Denver, Colorado.

APPEARANCES

ROBERT N. MILLER, United States Attorney, and PATRICK MURPHY, Assistant United States Attorney, Denver, Colorado, appearing for the plaintiff.

MICHAEL BENDER, Attorney at Law, Denver, Colorado, appearing for the defendant.

* * *

(p. 2) *PROCEEDINGS*

THE COURT: We're calling up another matter hopefully that would be very short, 82-CR-71, United States vs. Curtis Guidry, G-u-i-d-r-y. I think we need a defense attorney, though.

MR. MURPHY: We need Mr. Bender and Mr. Guidry. Here they are.

THE COURT: There is Mr. Bender, anyway.

We do have someone here from the Probation Department? Yes. Okay. We also have someone here from the Marshal's Office. Okay.

Earlier this morning, for the record, I was requested to take a plea on this case, even though the case was just apparently filed today.

Representing the Government . . .

MR. MURPHY: Patrick Murphy. I'm the Chief of the Criminal Division; and Mr. Miller, the U.S. Attorney, is here also.

THE COURT: Mr. Miller himself is here in court on this one?

MR. MILLER: Yes, your Honor.

THE COURT: And Patrick Murphy.

Representing the defendant . . .

MR. BENDER: If it please the Court, your Honor Michael Bender, appearing on behalf of William Curtis Guidry.

THE COURT: Mr. Guidry is the gentleman seated next to (p. 3) you at the defense table?

MR. BENDER: Yes, your Honor. That's correct.

THE COURT: My understanding from talking to the attorneys briefly this morning is that Mr. Guidry wanted to enter a plea in this case.

MR. BENDER: That is correct, your Honor.

THE COURT: Maybe you could just tell me a little more about what, if any –

MR. MURPHY: I will give you a background, your Honor.

THE COURT: Could you, please.

MR. MURPHY: For the record, this case was turned over to the United States Attorney's Office on the first day that I started. As I recall, it was in October of 1981. The investigation began after routine audit by the Labor Department of the Sheetmetal Workers Local 9, a labor union in the state that has 1,550 members. It was conducted by the labor union and the audit showed discrepancies in the books; so our office called a task force together of the FBI and the Labor Department, assigning responsibilities out in the investigation, and discovered that it was going to take considerable amount of time because we needed just – the discrepancies were just the tip of the iceberg

The investigation proceeded. Mr. Guidry became a suspect. He retained Mr. Bender, and Mr. Bender – Mr. Martin of our office and I have been handling the case, and we have been in touch with Mr. Bender on several occasions prior to today. He's (p. 4) had an opportunity – it involves checks that were signed by the defendant and some cash withdrawn from a savings account by the defendant. We have actually given the defendant an opportunity with his attorney – and that was Monday of this week – to come to our office and review those checks personally to see them.

We've had lengthy discussions; and the plea agreement is stated in the Prosecutor's Statement: that if Mr. Guidry enters a plea of guilty to this information, the Government will agree that no further criminal charges will be brought against him for embezzlement from the Sheetmetal Workers Local Union 9.

* * *

(p. 9) MR. MURPHY: Yes, your Honor.

United States District Court for the District of Colorado, the United States of America, Plaintiff, vs. Curtis Guidry, the defendant. It's an information charging a violation of Title 29, United States Code, section 501(c).

Are you the Curtis Guidry named in that information?

THE DEFENDANT: Yes, I am.

MR. MURPHY: The Information charges – the United States Attorney charges that from on or about April 1, 1977, to on or about September 30, 1981, in the District of Colorado, Curtis Guidry did embezzle, steal, and unlawfully and willfully abstract and convert to his own use the monies, funds, and assets in the amount of approximately $377,301.53 of the General Account of the Sheetmetal Workers Local Union No. 9, Denver, Colorado, of which he was an officer, in violation of Title 29, United States Code, section 501(c).

How do you plead to that charge, sir?

THE DEFENDANT: Guilty.

* * *

(p. 11) BY THE COURT:

Q Mr. Guidry, you have offered to plead guilty to a very serious charge, a Federal charge, which carries up to a five-year prison term in Federal prison and up to a $10,000 fine. Do you (p. 12) realize that?

A Yes, your Honor.

Q Do you understand that penalty of up to five years and $10,000?

A Yes.

* * *

(p. 13) (THE COURT)

Q As long as I were to give you a sentence not over five years or $10,000 or both, that is a lawful sentence; and if I (p. 14) give you a lawful sentence, there is no appeal. Do you understand that?

A I do, your Honor.

Q Knowing all of this and knowing you have the right to go to a jury, could you just tell me in your own words why you wish to plead guilty?

A Well, your Honor, I know I did wrong. I have been ready for this plea since in October, as far as I'm concerned. You can say you're sorry about things. I could stand here and say I'm sorry. I can't undo it. The only thing I can say is that I did it, and I am willing to plead guilty to it.

Q You are saying that you're pleading guilty because you feel you are guilty; is that it?

A The thing is, I've got – you might call it a sickness or what. I became a victim in gambling. I am a compulsive gambler I am taking treatments for it.

Q All right.

A And that's the reason I am willing to plead guilty.

* * *

(p. 17) Q Okay. Mr. Guidry, I don't want to accept a plea of guilty unless there is a basis – a factual basis – for the plea of guilty; so let me talk to you just a little bit about what the Information alleges and what the Prosecutor's Statement states. The Prosecutor's Statement is a statement of what the prosecutor feels he could prove if this case were to go to trial. Have you had a chance to read the Prosecutor's Statement?

A I have.

Q Are the facts in the Prosecutor's Statement substantially true and correct?

(p. 18) A Yes, your Honor.

Q Now, I am not going to read the whole thing to you; but in effect it indicates that you were the Chief Financial Officer of the union and were responsible for conducting the day-to-day business of the union. Is that correct?

A That's correct.

Q And you were authorized to sign checks on the union's checking account?

A Yes, ma'am.

Q This indicates that during the period of time between April 1, 1977, and September 30, 1981, that you embezzled a total of $377,301.53 from the union.

A Yes, ma'am.

Q Is that correct?

A That's right.

Q Now, the Prosecutor's Statement goes on to indicate the five different ways in which this embezzlement was done. Is there anything incorrect about the listing of those various ways?

A No, your Honor.

Q The Statement is correct, then?

A It is correct.

• • •

(p. 19) Q Do you need any more time to think about this, or do you need any more time to discuss the case with your attorney?

A No, your Honor.

Q. Do you still want me to go ahead and accept your plea of guilty?

A Yes.

THE COURT: At this time, the Court will accept Curtis Guidry's plea of guilty to the Information, and the matter will be set for a sentencing hearing approximately four weeks from today.

• • •

Exhibit B

In re:	United States v. CURTIS GUIDRY
Statute:	29 U.S.C. § 501(c)
Penalty:	NMT $10,000; NMT 5 years; or both plus the cost of prosecution
Plea Agreement:	If Mr. GUIDRY enters a plea of guilty to Count 1 of the Information, the government will agree that no further criminal charges will be brought against him for embezzlement from the Sheet Metal Workers Local Union #9.

PROSECUTOR'S STATEMENT

Sheet Metal Workers Local #9 is a labor union with 1,550 members throughout the State of Colorado employed in the sheet metal trade at construction sites and in industrial plants. The union is a labor organization involved in collective bargaining relationships with approximately 85 employers. Local #9 derives most of its revenue from dues and fees paid by its members. CURTIS GUIDRY was the Business Manager and Financial Secretary of Local #9 from 1961 until September 30, 1981. He was the chief financial officer of the Union and was responsible for conducting the day to day business of the union. He was authorized to sign checks on the Union's checking account and had signature authority on the Union's savings accounts.

During the period of time between April 1, 1977, and September 30, 1981 GUIDRY embezzled a total of $377,301.53 from the Sheet Metal Workers Local Union

#9. The funds were embezzled in the following five different methods:

1. GUIDRY signed thirty-six checks totalling $119,509.90 written on the Labor Union's account at Central Bank and Trust and deposited this money in his personal account at the same bank.

2. GUIDRY made eight unauthorized cash withdrawals totalling $27,600 from the Union's savings account at Western National Bank and converted the money to personal use.

3. GUIDRY deposited a $2,000 check from JMR Leasing payable to the Labor Union into his personal account and converted the funds without authorization for personal use.

4. GUIDRY signed on behalf of the Labor Union seventeen Labor Union checks totalling $144,568.25 on the Union Welfare Fund account and deposited them in his personal account without authorization and for personal use.

5. GUIDRY, acting as the Financial Secretary of the Labor Union, deposited thirteen Pension Fund checks payable to Labor Union #9 for administrative services into his account for unauthorized personal use. These checks totalled $83,623.38.

(Italicized items are not part of the pre-printed form.)

United States District Court
DISTRICT OF COLORADO

(C.R.C.P. No. 26) **CASE NO.** *84-M-879*

WRITTEN OF CONTINUING GARNISHMENT

Curtis Guidry,
Plaintiff(s)

vs.

Sheet Metal National Pension Fund, et al., Defendants, & Sheet Metal International Assoc., Local No. 9, Intervenor & Sheet Metal Workers' Local No. 9 Pension Fund, Party under Rule 19, F.R.C.P.
Defendant(s)

Judgment Debtor's name, last known address, other identifying information: *Curtis Guidry, 1585 Dudley Street, Apartment 5A, Lakewood, CO 80215*

1. Original Amount of Judgment Entered *January 14, 1986* (date)	$	*275,000.00*
2. Plus any Interest Due on Judgment (*7.57* % per annum)	+ $	*5,589.36*
3. Taxable Costs (including estimated cost of service of this Writ)	+ $	*25.00*
4. Less any Amount Paid	- $	
5. Principal Balance/Total Amount Due and Owing	= $	*280,614.36*

I affirm that I am authorized to act for the Judgment Creditor and that this is a true and correct statement as of *4/22/86* (date).

Subscribed under oath before me on 4/22/86

/s/ Phyllis Quinn
Notary Public or Deputy Clerk
1563 Gaylord St., Denver, CO 80206
My Commission Expires: 2/2/89

BRAUER & BUESCHER, P.C.
/s/ Joseph M. Goldhammer
Signature (Type Name, Title, Address and Phone below)
Joseph M. Goldhammer, #5761
Attorney for Intervenor
1563 Gaylord Street
Denver, CO 80206/
(303) 333-7751

WRITT OF CONTINUING GARNISHMENT

To the United States Marshal or to the Sheriff of _____ County, or to any other person over the age of 18 years not a party to this action.

You are directed to serve TWO COPIES of this Writ of Continuing Garnishment upon *Sheet Metal Workers Local No. 9 Pension Fund, c/o Pamela M. Martin, Esq., 445 Union Blvd., #123, Lakewood CO 80228.* Garnishee, with proper return of service to be made to the Court.

TO THE GARNISHEE:

YOU ARE HEREBY SUMMONED AS GARNISHEE IN THIS ACTION AND ORDERED:

a. To answer the following questions under oath and to file your answers with the Clerk of the Court no less than 5 nor more than 10 days following the time you pay the Judgment Debtor for the first time following service of this Writ of Continuing Garnishment, or 40 days following service of this Writ upon you, whichever is less. YOUR FAILURE TO ANSWER THIS WRIT OF CONTINUING GARNISHMENT WILL RESULT IN THE ENTRY OF A DEFAULT AGAINST YOU.

b. To pay any nonexempt earnings to the Clerk of the Court no less than 5 nor more than 10 days following each time you pay the Judgment

Debtor (employee) during the effective period of this Writ and attach a copy of the Calculation of the Amount of Exempt Earnings used (the calculation under "Questions to be Answered by Garnishee" should be used for the first pay period, and one of the multiple calculation forms included with this Writ should be used for all subsequent pay periods).

c. To deliver a copy of this Writ of Continuing Garnishment, together with the Calculation of the Amount of Exempt Earnings, at the first time you pay the Judgment Debtor (employee).

d. To deliver a copy of each subsequent Calculation of the Amount of Exempt Earnings each time you pay the Judgment Debtor (employee) for the remainder of the effective period.

e. MAKE CHECKS PAYABLE AND MAIL TO THE CLERK OF THE *U.S. DISTRICT* COURT AT *1929 Stout Street Denver, CO 80294.* PLEASE PUT THE CASE NUMBER (shown above) ON THE CHECK.

JAMES R. MANSPEAKER
CLERK OF THE COURT
(SEE REVERSE SIDE)

BY: *Illegible Signature*
Deputy Clerk
DATE: 5/1/86

YOU ARE NOTIFIED (Employer also read "Notice to Judgment Debtor" below)

a. This Writ of Continuing Garnishment applies to all nonexempt earnings owed or owing during the 90 days following service of this Writ or until you have paid to the Clerk of the Court the amount shown on Line 5 on the front of this Writ, whichever occurs first. However, if you have already been served with a Writ of Continuing Garnishment or Writ of Garnishment for Child

Support, this new Writ is effective for the 90 days after any prior Writ terminates.

b. The following portion of any wages, salaries or commissions garnished is exempt from this Writ of Continuing Garnishment (See "Exemption Chart" below).

c. In no case may you withhold any amount greater than the Principal Balance Total Amount Due and Owing (Line 5 on the front of this Writ)

QUESTIONS TO BE ANSWERED BY GARNISHEE

The following questions MUST be answered by you under oath:

a. On the date and time this Writ of Continuing Garnishment was served upon you, was the Judgment Debtor employed by you?
___ YES __X__ NO
If YES, state how the Judgment Debtor is paid:
___ weekly ___ bi-weekly ___ semi-montly
___ monthly ___ other
The Judgment Debtor will be paid on the following dates during the 90 day effective period
_____

b. Are you under one or more Writs of Continuing Garnishment or Writ of Garnishment for Child Support against the Judgment Debtor?
___ YES __X__ NO
If YES, state the date on which all such Writs are expected to terminate _____

c. If the Judgment Debtor is employed and you answered NO to question b. complete the following calculation for the "first pay period" following service of this Writ. **See attached sheet for additional questions to be answered by garnishee.*

CALCULATION OF THE AMOUNT OF EXEMPT EARNINGS (First Pay Period)

Gross Pay for the First Pay Period from ___ thru ___	$ _____
Less Deductions Required by Law (For Example, Withholding Taxes, FICA)	- $ _____
Disposable Earnings (Gross Pay less Deductions)	= $ _____
Less Statutory Exemption (Use Exemption Chart Below)	- $ _____
AMOUNT TO BE WITHHELD AND PAID TO THE CLERK OF THE COURT	= $ _____

EXEMPTION CHART

PAY PERIOD	AMOUNT EXEMPT IS GREATER OF
Weekly	30 x Federal Minimum Hourly Wage or 75% of Disposable Earnings
Bi-weekly	60 x Federal Minimum Hourly Wage or 75% of Disposable Earnings
Semi-monthly	65 x Federal Minimum Hourly Wage or 75% of Disposable Earnings
Monthly	130 x Federal Minimum Hourly Wage or 75% of Disposable Earnings

I declare, under oath, that I am authorized to act for the Garnishee in this action, that the above answers are true and correct, and that I have delivered a copy of this Writ, together with the Calculation of the Amount of Exempt Earnings, to the Judgment Debtor at the time earnings were paid for the above First Pay Period (if earnings were paid).

Subscribed under oath before me on _____ (date)

_____ Signature
(Type Name, Title, Address and Phone below)

_____
Notary Public

My Commission Expires: _____

NOTICE TO JUDGMENT DEBTOR

A. Your employer may only withhold nonexempt earnings from your wages, salaries or commissions, but in no event more than the Principal Balance/Total Amount Due and Owing (Line 5 on the front of this Writ).

B. If you disagree with the amount withheld, you must make a good faith effort to talk to your employer within 5 days after being paid.

C. If you cannot settle the disagreement with your employer, you may file a written objection with the Clerk of the Court issuing this Writ within 10 days after being paid, stating, under oath, the specific mistake in the Calculation of the Amount of Exempt Earnings. YOU MUST USE AN APPROVED FORM which may be obtained from the Clerk of the Court.

D. You are entitled to a court hearing on your written objection to the Calculation of the Amount of Exempt Earnings.

E. Your employer cannot fire you because your earnings have been garnished. If your employer discharges you in violation of your legal rights, you may, within 90 days, bring a civil action for the recovery of wages lost because you were fired and for an order requiring that you be reinstated. Damages will be your lost wages, not to exceed six weeks, costs and reasonable attorney's fees.

RETURN OF SERVICE

STATE OF COLORADO ___ County of ___
I, ___, swear or affirm that I served two copies of the Writ

of Continuing Garnishment on ___ (date), at ___ (time), by _____.

Subscribed under oath _____
before me on _____ Signature
(date)

_____ My Commission Expires: ___
Notary Public Service Fee $___

MAKE YOUR CHECK PAYABLE TO THE CLERK OF THE COURT. SHOW CASE NUMBER ON YOUR CHECK. SEND ANSWER, AND CHECK, IF APPLICABLE, TO CLERK OF THE COURT:

Court Address: United States Courthouse
Denver, CO 80294

ADDITIONAL QUESTIONS TO BE ANSWERED BY GARNISHEE

The following questions MUST be answered by you under oath:

a. *On the date and time this Writ of Continuing Garnishment was served upon you, did you hold or possess any personal property owed to or owned by the Judgment Debtor?*

___ *YES* X[1] *NO*

b. *If YES, list all items of personal property (including money), and their location(s) (Attach additional pages if necessary)* _____
_____
_____

I declare, under oath, that I am authorized to act for the Garnishnee in this action and that the above answers are true and correct.

/s/ Raymond J. Sweeney
Signature
Type Name, Title, Address and Phone

Number
Raymond J. Sweeney, Counsel
1150 17th Street, N.W.
Washington, D.C. 20036
202/296-7002

Subscribed under oath before me on 23 June 1986
Date

/s/ Cheryl M. Mawo
Notary Public

My Commission expires: CHERYL M. MAWO Notary Public, District of Columbia My Commission Expires June 30, 1987

1/ For purposes of this Writ, the Garnishee denies that it "possesses any personal property owed to or owned by the Judgment Debtor" in light of the Court's comments indicating that it has equitable power to determine the distribution of all pension funds in question.

(C.R.C.P. No. 27)

UNITED STATES DISTRICT COURT for the DISTRICT OF COLORADO
/_/ COURT / _/ COUNTY/ _/ /COLORADO /

Case No. ___ Div./Ct. Rm. ___

CALCULATION OF THE AMOUNT OF EXEMPT EARNINGS

Plaintiff(s)
vs.

Defendant(s)

Judgment Debtor's Name _____
Gross Pay for
_____ thru _____ $ _____
Less Deductions - $ _____
Disposable Earnings = $ _____
Less Statutory Exemption - $ _____
AMOUNT PAID TO COURT = $ _____

I certify that I am authorized to act for the Garnishee in this action, that the above Calculation is true and correct, and that I have delivered a copy of this Calculation to the Judgment Debtor at the time earnings were paid for the above Pay Period.

Date: _____ _____
Signature

TEAR ALONG PERFORATED LINE AND MAIL WITH EACH CHECK TO CLERK OF THE COURT

• • •

(Three idential CALCULATION OF THE AMOUNT OF EXEMPT EARNINGS forms have been omitted.)

No. 1141. CALCULATION OF THE AMOUNT OF EXEMPT EARNINGS Bradford Publishing, 5825 W. 6th Ave., Lakewood, CA 80214 – (303) 233-6900

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 84-M-879

(Title omitted in printing)

TRAVERSE AND MOTION FOR HEARING TO ANSWERS TO WRIT OF CONTINUING GARNISHMENT FILED BY SHEET METAL WORKERS' LOCAL NO. 9 PENSION FUND

COMES NOW the Sheet Metal Workers' International Association, Local No. 9, Intervenor/Judgment Creditor, and traverses the answer filed by the Garnishee above-named and moves this Court for hearing, to-wit:

1. Intervenor/Judgment Creditor, upon information and belief, states that the writ of continuing garnishment answered by the Garnishee was not answered correctly in that Garnishee owes a pension to Plaintiff/Judgment Debtor Curtis Guidry, which pension is garnishable pursuant to federal law.

WHEREFORE, Intervenor/Judgment Creditor prays this Court to set the within traverse for hearing.

(Signature omitted in printing)

(Jurat omitted in printing)

(Certificate of mailing omitted in printing)

(Italicized items are not part of the pre-printed form.)

UNITED STATES DISTRICT COURT

DISTRICT OF *COLORADO*

CURTIS GUIDRY,
Plaintiff,

v.

NATIONAL SHEET METAL WORKERS' NATIONAL PENSION FUND, et al.,
Defendants, and SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL NO. 9,
Intervenor, and SHEET METAL WORKERS' LOCAL NO. 9 PENSION FUND,
Party Under F.R.Civ.P. 19.

JUDGMENT IN A CIVIL CASE

(Filed Jul 23, 1986)

CASE NUMBER: *84-M-879*

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered. *Pursuant to the Memorandum Opinion and Order, entered by United States District Judge Richard P. Matsch on July 23, 1986,*

IT IS ORDERED AND ADJUDGED *that the plaintiff, Curtis Guidry, shall have and recover the vested benefits under the respective plans; and it is*

FURTHER ORDERED, that all such benefits are subject to a constructive trust for the benefit of Sheet Metal Workers' International Association, Local No. 9; and it is

FURTHER ORDERED, that all pension benefits accrued to the date of judgment and owed to Curtis Guidry from the three pension funds are immediately payable to the Sheet Metal Workers' International Association, Local No. 9; and a constructive trust is imposed upon future payments of pension benefits owed to Curtis Guidry such that those benefits shall be paid directly to the Union until the $275,000 judgment plus interest entered January 14, 1986 has been satisfied.

Approved:

/s/ Richard P. Matsch
Richard P. Matsch
United States District Judge

July 23, 1986
Date

/s/ James R. Manspeaker
James R. Manspeaker
Clerk

(By) Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 84-M-879

(Title omitted in printing)

MOTION FOR NEW TRIAL OR TO ALTER, AMEND AND VACATE JUDGMENT WITH CITATION OF AUTHORITY

COMES NOW the Plaintiff, by and through undersigned counsel, to move the Court as follows:

• • •

IV. *Plaintiff is entitled to 75% of all pension benefits owing.*

Imposition by this Court of the "constructive trust" upon Plaintiff's pension benefits is a "garnishment" within the meaning of that term at 15 U.S.C. 1672(c). It is an equitable procedure through which the earnings of any individual are required to be withheld for the payment of any debt. Therefore, 15 U.S.C. 1673(a) and (c) prohibit attachment of more than 25% of all such benefits.

• • •

WHEREFORE, Plaintiff prays that the Court reconsider and vacate its judgment dated July 23, 1986. Plaintiff prays that judgment enter on behalf of the Plaintiff and against the Union upon the Union's Sixth Claim for Relief, dismissing that claim.

Alternatively, Plaintiff prays that this Court amend its judgment to decree that 75% of all Plaintiff's pension benefits are exempt from the operation of the equitable

procedure of constructive trust, leaving for appeal the issue as to whether the operation of 29 U.S.C. 1056 precludes imposition of constructive trust to the extent of the remaining 25%.

(Signature omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 84-M-879

CURTIS GUIDRY,

Plaintiff,

v.

SHEET METAL WORKERS' NATIONAL PENSION FUND, et al.,

Defendants,

and

SHEET METAL WORKER'S INTERNATIONAL ASSOCIATION, LOCAL NO. 9

Intervenor,

and

SHEET METAL WORKERS' LOCAL NO. 9 PENSION FUND,

Party Under Rule 19, F.R.C.P.

ORDER DENYING MOTION FOR NEW TRIAL

(Filed Aug 20, 1986)

Upon consideration of the plaintiff's motion for new trial, or to alter, amend and vacate judgment, filed August 5, 1986, and it being the view of this court that the legal arguments made are without merit, and that the constructive trust imposed by this court is not limited to the tracing of embezzled funds, and that no purpose would be served by the filing of an affidavit to that effect, it is now

ORDERED, that the motion for new trial or to alter, amend and vacate judgment is denied.

Dated: August 20, 1986

BY THE COURT:

/s/ Richard P. Matsch
Richard P. Matsch, Judge

(Certificate of Mailing omitted in printing)

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CURTIS GUIDRY,	)	
	)	
Plaintiff-Appellant,	)	No. 86-2323
	)	(Filed Aug. 24, 1988)
v.	)	
	)	
SHEET METAL WORKERS NATIONAL PENSION FUND, ET AL.	)	
	)	

Appeal from the United States District Court
For the District of Colorado
D.C. No. 84-M-879

Eldon Silverman (Michael P. Serruto with him on the briefs) of Elrod, Katz, Preeo & Look, P.C., Denver, Colorado, for Plaintiff-Appellant.

Joseph M. Goldhammer of Brauer & Buescher, P.C. (Raymond J. Sweeney, Washington, D.C., with him on the brief), Denver, Colorado, for Defendants-Appellees.

Before HOLLOWAY, Chief Judge; **MOORE,** Circuit Judge; and **RUSSELL,*** District Judge.

MOORE, Circuit Judge.

---

*Honorable David L. Russell, United States District Judge for the District of Oklahoma, sitting by designation.

This is an appeal from the district court's order placing a constructive trust upon plaintiff's pension benefits. The trust was imposed to allow recovery of a judgment obtained by the Sheet Metal Workers' International Association, Local No. 9 (the Union), for money embezzled by Mr. Guidry from the pension fund. Plaintiff argues that the anti-alienation provision of ERISA (the Act) should have precluded the district court from placing his pension benefits in a constructive trust. Plaintiff also claims that imposition of a constructive trust must be limited to funds linked to his embezzlement and traceable into the pension funds, or, alternatively, that seventy-five percent of pension benefits must be exempted from the constructive trust because of garnishment restrictions in the Consumer Credit Protection Act. We are not persuaded by these arguments and affirm the district court's decision.

From 1964 until 1981, Mr. Guidry served as business manager and chief executive officer of the union. During approximately the last five years of this period, Mr. Guidry was also a trustee of the Union's pension fund. When he resigned as business manager, the Union commissioned an audit which concluded that nearly $1,000,000 had been stolen from it. In March 1982, Mr. Guidry pled guilty to embezzling $377,000 from the Union by depositing into his own account checks made payable to the Union from several trust funds. The Union and Mr. Guidry stipulated to the entry of a $275,000 judgment in January 1986 on the Union's first five claims of relief. That judgment has been certified as final.

Mr. Guidry brought this suit after being denied early retirement pension benefits by the Sheet Metal Workers'

National Pension Fund and the Sheet Metal Workers' Local Unions and Councils Pension Plan.[1] The defendant pension funds claimed they owed no benefits because plaintiff's misconduct forfeited his right to payment. Alternatively, the funds and the Union argued that plaintiff's pension benefits should be placed in a constructive trust until satisfaction of the stipulated judgment. The district court granted Mr. Guidry his pension funds but placed them in a constructive trust to be paid to the Union. In its order denying plaintiff's motion for a new trial, the court further held that the constructive trust was not limited to pension benefits actually traced to the embezzlement.

I

Plaintiff first contends that the district court's decision to impose a constructive trust on his interest in the pension plan is contrary to the anti-alienation provision of ERISA. This provision mandates that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. § 1056 (d)(1). The only express exceptions to this provision allow assignment for a "qualified domestic relations order" and "a voluntary and revocable assignment of not to exceed 10 percent of any benefit payment . . . ." 29 U.S.C. § 1056(d)(2),(3). Plaintiff further points out two circuit courts have held that the meaning of § 1056(d)(1) is clear

[1] The Union successfully moved to intervene in the suit and joined the Local No. 9 Pension Fund.

and have therefore refused to find an exception for criminal conduct. *See Ellis Nat'l Bank of Jacksonville v. Irving Trust*, 786 F.2d 466 (2d Cir. 1986); *United Metal Prods. v. National Bank of Detroit*, 811 F.2d 297 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 1494 (1988).

However, the anti-alienation provision has not been regarded as immutable by the courts. In *Stone v. Stone*, 632 F.2d 740 (9th Cir. 1980), *cert. denied*, 453 U.S. 922 (1981), for example, the court required pension plan payments to be made directly to an ex-spouse to pay her community property share. A number of courts have also garnished pension plan benefits to satisfy alimony and child support obligations.[2] *E.g., American Tel. & Tel. v. Merry*, 592 F.2d 118 (2d Cir. 1979); *Senco of Florida v. Clark*, 473 F. Supp. 902 (M.D. Fla. 1979). In all of these decisions, courts have used their inherent equitable authority to find implied exceptions to ERISA's anti-alienation provision when the beneficiary sought to avoid a legal duty.

Building upon these earlier decisions, the D.C. Circuit and the Eleventh Circuit have decided that a court may garnish a beneficial interest in a plan to satisfy a judgment based on a breach of ERISA. In *Crawford v. La Boucherie Bernard, Ltd.*, 815 F.2d 117 (D.C. Cir.), *cert. denied*, 108 S. Ct. 328 (1987), the court offset the interest of a participant and trustee in a profit sharing plan against a judgment based on his embezzlement of trust funds. The court emphasized the broad goal of ERISA to "protect . . .

[2] This family support exception was later codified by Congress in its amended ERISA statute, 29 U.S.C. § 1056(d)(3).

the interests of participants in employee benefit plans . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b). The court also noted ERISA provides that a person who breaches a fiduciary duty "shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, . . . and shall be subject to such other equitable or remedial relief as the court may deem appropriate . . . ." 29 U.S.C. § 1109(a). Pursuant to these statutes, the court held that it had broad authority to fashion remedies, including offsetting defendant's plan benefits against a judgment debt, to redress breaches by trustees and to protect the interests of participants and beneficiaries. 815 F.2d at 119.

The court in *St. Paul Fire and Marine Ins. v. Cox*, 752 F.2d 550 (11th Cir. 1985), also held that a trustee-participant's interest in a pension fund could be garnished to satisfy a judgment debt resulting from embezzlement of funds. The court found that ERISA's purpose of establishing standards to assure the equitable character of pension funds included protecting employees against mismanagement of these funds. "The insulation of an employee from liability for the consequences of his criminal misconduct does not protect the financial interests of other employees or promote security in the workplace," the court concluded. 752 F.2d at 552. "On the contrary, in such cases garnishment of the employee's fund interest best serves the financial stability of the employer and, indirectly, the employer's pension plan." *Id. See also Calhoun v. FDIC*, 653 F. Supp. 1288, 1293 (N.D. Tex. 1987) (following *St.*

Paul Fire in holding the FDIC's withholding of pension plan benefits to an insolvent bank did not violate ERISA's anti-alienation provision).

We agree with the D.C. and Eleventh Circuits and decline to follow the holdings of *Ellis Nat'l Bank United Metal Prods.*[3] A major purpose of ERISA is to safeguard

---

[3] The courts in these two decisions rely upon identical arguments distinguishing between the accepted family support exception and the fraud exception. *See United Metal Prods.*, 811 F.2d at 299-300; *Ellis Nat'l Bank*, 786 F.2d at 470-471. We do not think these arguments are persuasive. First, both courts argue that only the family support exception rests on the express fundamental purpose of ERISA to provide income to workers and their families. The courts overlook, however, the Act's expressed purpose of protecting employees from mismanagement of their pension funds. This purpose would not be advanced by letting fiduciaries who have acted fraudulently enjoy pensions from funds damaged by their misconduct. Second, both courts point out that the Labor and Treasury Departments have urged the adoption of the family support exception but have remained silent on the fraud exception. We agree that recommendations by these agencies should be given some weight. But their interpretation is not controlling. *E.g., Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). The fact that neither agency has recommended the fraud exception does not persuade us to ignore the strong arguments supporting such an exception. Third, the two courts recognize "abundant case law" supporting the family support exception and very few cases accepting the fraud exception. While the family support exception was broadly accepted even before it became codified, three circuit courts have implied a fraud exception to the anti-alienation provision of ERISA and only two have refused to allow the exception. Fourth, both courts express worry regarding the scope of the fraud exception, which they opined would likely be resolved only after extensive litigation.

(Continued on following page)

"the continued well-being and security of millions of employees and their dependents . . . [by establishing] minimum standards . . . assuring the equitable character of [pension fund] plans and their financial soundness." 29 U.S.C. § 1001(a). We find no indication in the Act that the unscrupulous fiduciary is to be protected from the natural legal consequences of his or her misdeeds. Indeed, as the D.C. Circuit noted, "A contrary interpretation would permit trustee wrongdoers to benefit from their misdeeds at the expense of those whom ERISA was designed to protect." *Crawford*, 815 F.2d at 121. When Mr. Guidry left office after embezzling at least $370,000, the Union had only $150,000 in cash assets remaining, and the financial security of workers who relied upon the Union's pension plan was severely undermined. Given the express purpose of ERISA to protect the financial security of employees, we find it extremely unlikely that Congress intended to ignore equitable principles by protecting individuals such as the plaintiff from the consequences of their misconduct.[4]

(Continued from previous page)

However, we believe a narrow exception applicable only to a trustee-beneficiary who has directly or indirectly damaged the fund through his fraudulent actions could be relatively easily defined and applied. Finally, both courts emphasize that the family support exception involves family relations, which are traditionally within the realm of state police power. But we believe the public interest in seeing that theft victims recover their stolen property is no less fundamental and firmly embedded within the realm of state police power.

[4] We are aware of the recent decision of *Mackey v. Lanier Collections Agency & Serv.*, 108 S. Ct. 2182 (1988), in which the

(Continued on following page)

Furthermore, the district court's use of a constructive trust to redress breaches of ERISA was proper. The Supreme Court has consistently emphasized the inherent equitable jurisdiction of federal district courts.[5] *See Cummings By Techmeier v. Briggs & Stratton Retirement Plan*, 797 F.2d 383, 390 (7th Cir.), *cert. denied*, 107 S. Ct. 648 (1986). For example, in *Mitchell v. Robert De Mario Jewelry*, 361 U.S. 288, 291 (1960), the Court stated that "[u]nless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction." Any statutory restriction of a court's jurisdiction in equity must be clearly stated or be accomplished by "a necessary and inescapable inference." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398. "The great principles of equity, serving complete justice, should not be yielded to light inference or doubtful construction." *Id.* (quoting *Brown v. Swann*, 34 U.S. (10 Pet.) 29 (1836)).

Far from limiting the inherent power of a district court, Congress emphasized on several occasions the

---

(Continued from previous page)

Supreme Court stated in dicta that ERISA's anti-alienation provision precludes garishment of pension benefits. The Court's discussion, however, focused on its holding that Congress did not intend to preempt state-law garnishment procedures of an ERISA *welfare benefit plan* (emphasis added). It neither discussed in depth nor cited support for its statement regarding pension benefit plans. We therefore do not believe this decision is dispositive of the issues in the instant case.

[5] Here, we contrast equitable jurisdiction with jurisdiction in law which we previously held is restricted to the specifics created by statute. *Wyeth Laboratories v. United States Dist. Court for Dist. of Kan.*, 851 F.2d 321 (10th Cir. 1988).

broad scope of remedies available under ERISA. In addition to the previously mentioned statutory language giving the courts authority to fashion remedies, *e.g.*, 29 U.S.C. § 1109(a), the legislative history of the Act indicates Congressional intent to provide a broad variety of remedies for redressing the interests of participants and beneficiaries when they have been adversely affected by breaches of fiduciary duty. *See Eaves v. Penn*, 587 F.2d 453, 462 (10th Cir. 1978). For example, the Report of the Senate Committee on Labor and Public Welfare states: "The enforcement provisions have been designed specifically to provide both the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations . . . . The intent of the committee is to provide the full range of legal and equitable remedies available in both state and federal courts." S. Rep. No. 93-127, 93d Cong., 1st Sess., *reprinted in* 1974 U.S. Code Cong. & News 4838, 4871. In developing these remedies, Congress intended the federal courts to draw upon principles of traditional trust law:

> Neither existing State nor Federal law has been effective in preventing or correcting many . . . abuses [by fiduciaries]. Accordingly, the legislation imposes strict fiduciary obligations on those who have discretion or responsibility respecting the management, handling, or disposition of pension or welfare plan assets. The objectives of these provisions are to make applicable the law of trusts; . . . to establish uniform fiduciary standards to prevent transactions which dissipate or endanger plan assets; and to provide effective remedies for breaches of trust.

Statement of the Honorable Harrison A. Williams, Jr., 230 Cong. Rec. S-15737, Aug. 22, 1974, *reprinted in* 1974 U.S. Code Cong. & Admin. News 5177, 5186.

Trust law contemplates the use of flexible remedies which well be most advantageous to the trust's participants and will be most conducive to effectuating the purposes of the trust. *Eaves v. Penn*, 587 F.2d at 462 (quoting *Restatement (Second) of Trusts* § 214 (1959)). It is also an axiom of trust law that a trustee should not be permitted to benefit from his own breaches, *Restatement (Second) of Trust* § 205 comment i, and the constructive trust has long been recognized as a method for preventing the unjust enrichment of a trustee who has fraudulently divested a trust. *E.g., Askins v. Easterling*, 347 P.2d 126 (Colo. 1959); *Unicure, Inc. v. Thurman*, 599 P.2d 925 (Colo. App. 1979). We believe the district court's imposition of a constructive trust on plaintiff's pension benefits both accorded with these principles of trust law and was well within its discretionary power as defined by the common law and ERISA. We therefore affirm its employment of the constructive trust remedy.

II.

Plaintiff next argues that even if the use of the constructive trust is upheld, it can only be used to recover the specific property wrongfully taken. Therefore, plaintiff claims, the Union may employ this remedy to only recover embezzled money which was deposited in the pension funds. The Union cannot make this showing because plaintiff dissipated the embezzled funds through gambling.

This argument is not convincing. Plaintiff correctly states the standard rule that beneficiaries only have a personal claim against a trustee unless they are able to

trace the trust property. However, if the trustee is also a beneficiary, it is a tenet of trust law that other beneficiaries can compel repayment out of the trustee's beneficial interest of any losses to the trust resulting from a breach of duty. This rule applies even if the beneficiaries cannot trace the stolen trust property. III A.W. Scott. *Scott on Trusts* § 202 (3d ed. 1967). As Professor Scott explains:

> If the trustee is also one of the beneficiaries . . . the other beneficiaries can compel him to make good the breach of trust out of his beneficial interest in the trust property. The defaulting trustee-beneficiary is not entitled to receive his share of the trust property until he has made good the loss which resulted from his breach of trust. . . . Thus if T is trustee under a trust to divide the income among two other beneficiaries and himself for life, and he commits a breach of trust resulting in a diminution of the income, the other beneficiaries are entitled to insist that the loss of income shall be made good out of his interest. . . . The truth is that the impounding of the share of the trustee-beneficiary is a method of compelling him to make specific restitution for the breach of trust in a situation where it is possible thus to compel specific restitution.

Id. § 257. *See also* G.G. Bogert & G.T. Bogert, *The Law of Trusts and Trustees* § 191 (2d ed. 1979) ("[i]f a beneficiary is also a trustee of his own trust . . . and . . . if he steals trust funds, or causes damage to the trust estate in other ways, his share under the trust, whether in his own hands or those of a transferee, will be taken by the court in order to make good the loss").

The few relevant cases uniformly follow the rule articulated in these treatises. For example, in *In re Van Nostrand's Will*, 29 N.Y.S.2d 857 (Sur. Ct. 1941), the court placed an equitable lien upon the beneficial interest of a

trustee who had embezzled trust property to compensate wronged beneficiaries of the trust. The trustee-beneficiary was treated as having received his interest by anticipation: he could not enjoy his beneficial interest because he had already embezzled his share of the trust. 29 N.Y.S.2d at 865. *See also In re Watson*, 449 N.E.2d 1156 (ind. Ct. App. 1983 (successor trustee properly applied former trustee's undistributed income to satisfy prior judgment for embezzling trust corpus); *In re Brereton's Estate*, 130 A.2d 453 (Pa. 1957) (beneficiaries may impound share of trustee-beneficiary who advanced himself sums from the trust).

The fact that the anti-alienation provision of ERISA might be interpreted as a spendthrift clause does not preclude the use of a constructive trust to garnish plaintiff's pension benefits. While the interest of a trustee-beneficiary of a spendthrift trust cannot be reached by his creditors, other beneficiaries can still impound the interest losses resulting from a breach of trust unless the settlor of the trust specifies otherwise. *See, e.g., Restatement (Second) of Trusts* § 257 comment f; III *Scott on Trusts* § 257.1. In *In re Burr*, 257 N.Y.S. 654 (Sur. Ct. 1932), *aff'd* 263 N.Y.S. 945 (N.Y. App. Div. 1933), for example, the court held that a trustee properly withheld trust payments owed to a prior trustee who had misappropriated trust funds. In reaching this conclusion, the court disregarded a state statute precluding the assignment of a beneficiary's interest because "[i]t was not intended to protect a dishonest fiduciary in the retention of income

otherwise payable to him from the trust." 257 N.Y.S. at 657.[6]

Congress did not intend for ERISA's anti-alienation provision to protect dishonest fiduciaries. Simply, there is no indication in ERISA's statutory language or legislative history that an unscrupulous trustee should be shielded

---

[6] While the court in another leading case, *Blakemore v. Jones*, 22 N.E.2d 112 (Mass. 1939), apparently reached an opposite conclusion, it probably did so by interpreting the testator's intent as prohibiting the impoundment of the trustee-beneficiary's interest. In *Blakemore*, the testator created a trust for his widow. After the named trustees disclaimed the responsibility, the court appointed the widow and her attorney as co-trustees. Through lack of good judgment by her co-trustee, the trust lost some of its principal, and a surety sought to reach her interest in the trust. The court held that the widow's interest could not be reached because the testator had created a spendthrift trust.

Although the court did not discuss the testator's intent, it is noteworthy that he did not appoint his wife trustee. Furthermore, the widow did not act dishonestly or otherwise try to defraud the fund. As one commentator stated:

> The familiar rationale of spendthrift trusts is that the settlor's intent should be given effect if it does not violate public policy. . . . Such a violation does not seem to have occurred in the [Blakemore] case, since a trustee may by special provision be relieved from any liability for losses negligently incurred. . . . Although the [*Blakemore*] court did not stress [the widow's] lack of moral fault, it seems clear that the present case should not control where the breach of trust is dishonest. A spendthrift clause hardly manifests an intention to protect the trustee-beneficiary where he is dishonest, and even if such an intention could be found policy should forbid its fulfillment.

Recent Cases, 53 Harv. L. Rev. 129, 148 (1939) (citations omitted).

from the consequences of his misdeeds. On the contrary, there are repeated references to the goal of promoting stability in the work place by protecting the beneficiaries from potential misdeeds, negligence, and mismanagement by fiduciaries of benefit plans. *E.g.*, 29 U.S.C. § 1001(b). Given this professed purpose of ERISA, we do not think Congress intended the anti-alienation provision to preclude the impoundment of the beneficial interest of a trustee who has damaged a trust through embezzlement. We therefore hold that the district court properly imposed a constructive trust upon plaintiff's pension benefits, regardless of whether the embezzled funds could be traced back into the trust.

III.

Plaintiff's final argument is that he may exempt seventy-five percent of his pension benefits from garnishment under the provisions of the Consumer Credit Protection Act. According to this legislation, only a maximum of twenty-five percent of an individual's weekly earnings may be garnished. 15 U.S.C. § 1673(a). "Earnings" are defined as "compensation paid or payable for personal services, whether denominated as wages [or] salary . . . and includes periodic payments pursuant to a pension or retirement program." 15 U.S.C. § 1672(a); *see also Ward v. Ward*, 396 A.2d 365 (N.J. Sup. Ct. 1978) (pension benefits are "earnings" under the Consumer Credit Protection Act). Furthermore, "garnishment" is defined as "any legal or equitable procedure through which the earnings of an individual are required to be withheld for payment of any debt," 15 U.S.C. § 1672(c), and could encompass the constructive trust levied in the instant case.

However, plaintiff appears to have not complied with the procedural requirements of Colorado's garnishment laws.[7] According to the Colorado Rules of Civil Procedure, after the garnishee delivers a copy of the judgment creditor's writ of continuing garnishment with a statement of exempt and nonexempt earnings, the judgment debtor has five days to resolve any dispute regarding these calculations. C.R.C.P. 103, § 6(a)(1) (1987 Supp.). If the judgment debtor's objection is not resolved within

---

[7] State garnishment laws are applicable to proceedings in federal courts. Fed. R. Civ. P. 64. Also, we note that Colorado's garnishment laws are not preempted by ERISA. Although the preemption clause in ERISA broadly provides that the Act "shall supersede any and all state laws insofar as they . . . relate . . . to any employee benefit plan," 29 U.S.C. § 1144(a), a great number of courts considering pension benefits have refused to hold that state garnishment laws are preempted by this provision. *E.g., American Tel. & Tel. v. Merry*, 592 F.2d at 118; *Operating Engineers' Local No. 428 Pension Trust Fund v. Zamborsky*, 650 F.2d 196, 199 (9th Cir. 1981). Preemption of state law is not favored unless Congress has unmistakenly so ordained or the nature of the regulated subject matter permits no other conclusion. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981). For the reasons given in this opinion, we do not believe Congress intended the preemption provision to preclude beneficiaries from garnishing a trustee's beneficial interest to rectify damage done to the trust as a result of his misconduct. Furthermore, as the Supreme Court recently pointed out, ERISA does not provide a mechanism for collecting judgments won against an ERISA plan. Consequently, state law methods for collecting money judgments must generally remain undisturbed by ERISA or there would be no way to enforce a judgment. *Mackey v. Lanier Collecting Agency & Serv.*, 108 S. Ct. at 2187.

this period, he has five more days to file a written objection with the court. C.R.C.P. 103, § 6(a)(2). Alternatively, the judgment debtor who fails to file a written objection may within six months of receiving the writ of garnishment object to the court if new evidence indicates that error occurred. C.R.C.P. 103, § 6(d)(1),(2). From the record provided by plaintiff, it is apparent he did not make any objection within the specified time period.

We are mindful that the garnishment proceedings in the instant case were unusual, since the three defendant pension funds argued throughout the proceedings that plaintiff had forfeited his pension benefits by his fraudulent conduct and therefore the Union could not garnish any money in the funds. Nevertheless, Colorado places the burden of objecting to a writ of garnishment firmly upon the judgment debtor; the failure of the judgment debtor to file a timely objection results in the automatic disbursement of the garnished money to the judgment creditor. C.R.C.P. 103, § 1(L)(1). Plaintiff in the instant case received a copy of the writ of garnishment which both gave the calculation of the nonexempt money owed to the Union and enumerated his right to object to the garnishment. Plaintiff should have then responded to the Union's writ seeking all his pension benefits by bringing the exemption restriction of the Consumer Credit Protection Act to the court's attention. Having failed to do so, we believe plaintiff may not now raise this issue several years after the writs of garnishment were issued. The issue of the exemption was not properly before the district court; therefore, we refuse to consider it. Accordingly, we affirm the district court's judgment imposing a

constructive trust upon all of the plaintiff's pension benefits until the judgment debt is satisfied.

AFFIRMED.

PETITIONER'S

BRIEF

No. 88-1105

Supreme Court, U.S.
FILED
AUG 9 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

CURTIS GUIDRY,

Petitioner,

v.

SHEET METAL WORKERS NATIONAL PENSION FUND; SHEET METAL WORKERS' LOCAL UNIONS AND COUNCILS PENSION PLAN; SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 9; SHEET METAL WORKERS LOCAL NO. 9 PENSION FUND; et al.,

Respondents.

On Writ of Certiorari
To The United States Court of Appeals
For the Tenth Circuit

PETITIONER'S OPENING BRIEF

ELDON E. SILVERMAN*
SCOTT GELMAN
SILVERMAN AND GELMAN, P.C.
1600 Stout, Suite 1000
Denver, Colorado 80202
(303) 573-5266

KENNETH T. EICHEL
ROBERT E. PENNINGTON
ELROD, KATZ, PREEO & LOOK, P.C.
1120 Lincoln, Suite 1100
Denver, Colorado 80203
(303) 832-1900

Counsel for Petitioner

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO.

QUESTIONS PRESENTED

1. Does the plain language of the anti-alienation clause of the Employee Retirement Income Security Act of 1974, 88 Stat. 864, 29 U.S.C. § 1056(d)(1), as well as its legislative history and subsequent administrative interpretations, mandate that Congress, not the courts, decide whether a "criminal misconduct" exception is required?

2. If the "criminal misconduct" exception created by the courts is allowed to stand, is Guidry, as judgment debtor, still entitled to have his pension benefits 75% exempt under the Consumer Credit Protection Act, 82 Stat. 163, 15 U.S.C. § 1673, and under Colorado state law?

LIST OF PARTIES AND CORPORATIONS

A list of the parties to this proceeding has previously been filed by Petitioner Guidry in the "List of Parties," contained on page i of Guidry's Petition for Writ of Certiorari.

TABLE OF CONTENTS

Page

Questions Presented i

List of Parties and Corporations ii

Table of Authorities v

Opinions Below 1

Jurisdiction 2

Statutes and Regulations Involved 2

Statement of the Case 3

Summary of Argument 10

Argument 14

1. The Plain Language of ERISA's Anti-Alienation Clause, as Well as its Legislative History and Subsequent Administrative Rulings, Leave No Room for Judicial Rule Making 14

   A. The Plain Meaning of ERISA Section 206(d)(1) is Self-Evident 14

   B. The Legislative Purpose as Shown in the Preamble, the Legislative History, and Subsequent Authorized Administrative Interpretations all Bolster the Plain Meaning and Text of the Anti-Alienation Clause 18

   C. Even if the Statutory Construction Concept of *In Pari Materia* is to be Used, the Various Federal Retirement Statutes Should be Used in Comparison to ERISA, Not Other More General Statutes 22

2. The Hazards of Judicial Rule Making are Amply Demonstrated by Certain Court Decisions and by the Facts in This Case 26

   A. Other Courts Have Correctly Refrained from Interfering with the Anti-Alienation Clause ... 26

TABLE OF CONTENTS – Continued

Page

B. The Hazards of Judicial Exception to Legislative Mandate are Clearly Shown by the Facts of this Case 30

3. Even Assuming that the Constructive Trust is Permissible Under the Anti-Alienation Provision of ERISA, the Court of Appeals Misapprehended the Clear Facts and Law of this Case in Denying Guidry a 75% Exemption Under the Consumer Credit Protection Act, 15 U.S.C. § 1671, *Et Seq.*..... 34

A. Colorado's Statute on Exemptions in Garnishment Incorporates the Consumer Credit Protection Act, and Further, Puts the Burden on the Garnishee, not the Debtor, to Calculate Exemptions 34

B. Since the Garnishee Pension Funds Never Calculated the Amount of Exempt Earnings, Guidry had no Reason to Object to a Blank Form, Even Though the Exemption was Raised to the District Court..... 37

C. Regardless of Colorado Law and Procedures, the Consumer Credit Protection Act Mandates that Exemptions are Self-Executing... 40

Conclusion 41

Appendix A.....App. 1-16

TABLE OF AUTHORITIES

Page

CASES:

Batterson v. Francis, 432 U.S. 416 (1977)..... 21

Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) 15

California v. Sierra Club, 451 U.S. 287 (1981) 16

Crawford v. La Boucherie Bernard, Ltd., 815 F.2d 117 (D.C. Cir., 1987), cert. denied, 108 S. Ct. 328 (1987) 14, 21

Cummings By Techmeier v. Briggs & Stratton, 797 F.2d 383 (C.A. 7th, 1986), cert. denied, 107 S. Ct. 648 (1986)..... 27

Donovan v. Hamilton County Municipal Court, 580 F. Supp. 554 (S.D. Ohio, 1984)..... 40

Ellis Nat. Bank of Jacksonville v. Irving Trust Co., 786 F.2d 466 (C.A. 2, 1986) 27, 31

Erlenbaugh v. United States, 409 U.S. 239 (1972)..... 23

Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976)...10, 15

Federal Deposit Insurance Corporation v. Farha, Case No. 87-1530, Slip Opinion filed June 13, 1989 ..22, 33

First Nat. Bank of Denver v. Columbia Credit Corp., 499 P.2d 1163 (Colo. 1972)..... 40

General Motors Corp. v. Buha, 623 F.2d 455 (1980) 21

Guidry v. Sheet Metal Workers National Pension Fund, 856 F.2d 1457 (C.A. 10, 1988)..... 1, 21, 33

Hamilton v. Rathbone, 175 U.S. 414 (1899)..... 24

Hodgson v. Cleveland Municipal Court, 326 F. Supp. 419 (N.D. Ohio, 1971) 40

TABLE OF AUTHORITIES – Continued

Page

Mackey v. Lanier Collection Agency and Serv., 108 S. Ct. 2182 (1988) 32, 33

Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985) 16

Nachman Corp. v. Pension Benefit Guar. Corp, 446 U.S. 359 (1980) 20, 34

S & E Contractors, Inc. v. United States, 406 U.S. 1 (1972) 15

Shaw v. Delta Airlines, Inc., 463 U.S. 85 (1983) 17, 23

St. Paul Fire & Marine Ins. Co. v. Cox, 752 F.2d 550 (C.A. 11, 1985) 14, 22, 31

United Metal Products v. National Bank of Detroit, 811 F.2d 297 (C.A. 6, 1987), cert. dis., 108 S. Ct. 1494 (1988) 27

United Mine Workers of America v. W. A. Boyle, 567 F.2d 112 (D.C. Cir., 1977) 24, 25, 27

Vink v. SHV North American Holding Corp., 549 F. Supp. 268 (S.D. N.Y., 1982) 26, 27, 31

STATUTES:

Civil Service Retirement Act, 80 Stat. 583, 5 U.S.C. § 8346(a) 24

Colorado Continuing Writ of Garnishment Statute, C.R.S. 13-54.5-101, *et seq.*:

C.R.S. 13-54.5-101(1) 36

C.R.S. 13-54.5-101(2) 36

C.R.S. 13-54.5-101(4) 36

C.R.S. 13-54.5-102(2) 36

TABLE OF AUTHORITIES – Continued

Page

C.R.S. 13-54.5-103(3) 36

C.R.S. 13-54.5-111 36

Consumer Credit Protection Act, 82 Stat. 163, 15 U.S.C. 1671 *et seq.*:

15 U.S.C. § 1672(a) 2, 10, 35

15 U.S.C. § 1672(c) 3, 9, 35, 39

15 U.S.C. § 1673(a) 8, 12, 35, 40

15 U.S.C. § 1673(c) 40

15 U.S.C. § 1676 40

Employee Retirement Income Security Act of 1974, 88 Stat. 829, 29 U.S.C. 1001, *et seq.*:

29 U.S.C. § 1001(a) 18

29 U.S.C. § 1001(b) 18

29 U.S.C. § 1053(a) 7, 8, 12, 20, 30, 31

29 U.S.C. § 1056(d)(1) 2, 9, 11, 14, 15, 22, 31

29 U.S.C. § 1056(d)(2) 11, 15

29 U.S.C. § 1056(d)(3) 11, 16

29 U.S.C. § 1101 4

29 U.S.C. § 1104(a)(1)(D) 29

29 U.S.C. § 1109(a) 16, 28

29 U.S.C. § 1132(a) 16

29 U.S.C. § 1132(g) 4, 41

29 U.S.C. § 1144(a) 17, 22

29 U.S.C. § 1144(d) 17, 22

Internal Revenue Code, 88 Stat. 937, 26 U.S.C. § 401(a)(13) 2, 19

Labor-Management Relations Act, 1947, 61 Stat. 136, 29 U.S.C. § 141, *et seq.*:

29 U.S.C. § 141(b) 22

TABLE OF AUTHORITIES – Continued

Page

Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U.S.C. § 401 *et seq.*:
29 U.S.C. § 501 ..... 23, 24
29 U.S.C. § 501(a) 24, 25
29 U.S.C. § 501(c) 4, 5, 34

Railroad Retirement Act, 88 Stat. 1345, 45 U.S.C. § 231m(a) 24

Social Security Act, 49 Stat. 624, 42 U.S.C. § 407 24

Veterans Benefits Act, 72 Stat. 1229, 38 U.S.C. § 3101(a) 24

REGULATIONS:

26 C.F.R. 1.401(a)-13(b)(1) 3, 20

29 C.F.R. 870.51(c) 3, 40

Exec. Order No. 12,108, 44 Fed. Reg. 1065 (1978) 21

Reorg. Plan No. 4 of 1978, 3 C.F.R. 332 (1979) 21

LEGISLATIVE HISTORY:

H.R. Conf. Rep. No. 93-1280, 93rd Cong., 2nd Sess. 271, *reprinted in* 1974 U.S. Code Cong. & Ad. News P. 5038 ..... 19, 20

H.R. Rep. No. 93-807, 93rd Cong., 2nd Sess. 3, *reprinted in* 1974 U.S. Code Cong. & Ad. News P. 4670 19

RULES:

Fed. R. Civ. P. 54(b) 6

TABLE OF AUTHORITIES – Continued

Page

Colorado Rules of Civil Procedure 103:
Section 6(a)(2) 35
Section 6(d)(1) 35
Section 6(d)(2) 35

Form 26 to the Appendix to Colorado Rules of Civil Procedure 36, 37

TREATISES AND ARTICLES:

Restatement (Second) of Contracts, Section 317(1) 15

3 C.J.S. *Alienation*, 771-72 (1973) 15

Note, *Attachment of Pension Benefits Under ERISA*, 74 Northwestern University Law Review 2, 225 (1979) 29

Note, *Employee Theft and ERISA: A Proposed Amendment to Garnish Pension Benefits*, 10 Cardozo Law Review 315 (1988) 24, 29

Note, *ERISA – Exceptions to the Anti-Alienation Provision: Strengthening ERISA's Protection Through a Fraud Amendment*, 10 Western New England Law Review, 2, 317 (1988) 29

Note, *Weakening ERISA's Preemptive Powers: St. Paul Fire & Marine Ins. Co. v. Cox Creates an Implied Exception to the Anti-Alienation Provision for Employee Fraud*, 6 Virginia Tax Review 185 (1986) 19, 30

No. 88-1105

In The

Supreme Court of the United States

October Term, 1988

CURTIS GUIDRY,

Petitioner,

v.

SHEET METAL WORKERS NATIONAL PENSION FUND; SHEET METAL WORKERS' LOCAL UNIONS AND COUNCILS PENSION PLAN; SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 9; SHEET METAL WORKERS LOCAL NO. 9 PENSION FUND; et al.,

Respondents.

On Writ of Certiorari
To The United States Court of Appeals
For the Tenth Circuit

PETITIONER'S OPENING BRIEF

OPINIONS BELOW

The opinion of the Court of Appeals appears in the Joint Appendix ("J.A."), at 102-118 and is reported at 856 F.2d 1457 (C.A. 10, 1988). The opinion of the District Court appears in the Appendix to the Petition for Writ of Certiorari ("App. to Pet. for Cert."), at B-1 through B-5, and is reported at 641 F. Supp. 360 (D. Colo. 1986).

JURISDICTION

The judgment of the Court of Appeals (J.A. 102-118) was entered on August 24, 1988. A timely Petition for Rehearing was filed on September 7, 1988 by Petitioner Curtis Guidry ("Guidry") and was denied by the Court of Appeals on October 3, 1988. The Petition for a Writ of Certiorari was timely filed on December 31, 1988. The Petition was granted on June 26, 1989. The jurisdiction of this Court arises under 62 Stat. 928, 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

1. Section 206(d)(l) of the Employee Retirement Income Security Act of 1974, as amended 88 Stat. 864, 29 U.S.C. § 1056(d) provides:

> (1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

2. Section 401(a)(13) of the Internal Revenue Code, 88 Stat. 937, 26 U.S.C. § 401(a)(13) provides:

> A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated.

3. Section 302 of the Consumer Credit Protection Act, 82 Stat. 163, 15 U.S.C. § 1672 provides:

> (a) The term "earnings" means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program.

> (c) The term "garnishment" means any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt.

4. Treasury Regulation, § 1.401(a)-13(b)(l), 26 C.F.R. 1.401(a)-13(b)(l) provides:

> (b) *No Assignment or Alienation – (1) General Rule.* Under section 401(a)(13), a trust will not be qualified unless the plan of which the trust is a part provides that benefits provided under the plan may not be anticipated, assigned (either at law or in equity), alienated or subject to attachment, garnishment, levy, execution or other legal or equitable process.

5. Department of Labor Regulation, 29 C.F.R. 870.51 provides:

> (c) Particular attention is directed to the fact that subsection (a) of section 303, when considered with subsection (c) of that section, is read as not requiring the raising of the subsection (a) restrictions as affirmative defenses in garnishment proceedings.

6. Portions of Colorado Revised Statutes dealing with exemptions from garnishment, as well as the Colorado Rule of Civil Procedure and official Form dealing with writs of continuing garnishment are contained in Appendix A to this Brief.

STATEMENT OF THE CASE

In 1982, Guidry, an officer of the Sheet Metal Workers Local Union No. 9 in Denver, Colorado ("Union"), pled guilty to embezzling, stealing and unlawfully converting some $377,000.00 of the general account of the Union, in

violation of 73 Stat. 535, 29 U.S.C. § 501(c) (J.A. 79). The maximum sentence under this federal charge was up to a five-year prison term, and up to a $10,000.00 fine (J.A. 80). Guidry was indeed sentenced to serve the maximum sentence (J.A. 31 and 39). While employed by the Union, Guidry was a participant in three pension funds, namely, Sheet Metal Workers National Pension Fund, Sheet Metal Workers' Local Unions and Councils Pension Plan, and Sheet Metal Workers Local No. 9 Pension Fund ("Pension Funds") (J.A. 31). These Pension Funds were distinct from the Union.

While still in a federal correctional institution in Arizona (J.A. 4), Guidry initiated a Complaint in the United States District Court for the District of Colorado against two of the three Pension Funds, alleging that he was entitled to his pension benefits and had been denied them, due to his embezzlement. He further alleged that the plans of the Pension Funds in question, "make no eligibility exception for such acts" of embezzlement (J.A. 5 and 6). Guidry sought an order of the District Court, arising under the Employment Retirement Income Security Act of 1974 ("ERISA"), 88 Stat. 829, as amended, 29 U.S.C. § 1101 *et seq.*, that he was entitled to his pensions, and should be granted the costs of the suit, including reasonable attorney's fees, expert witness fees, and interest pursuant to 88 Stat. 891, 29 U.S.C. § 1132(g).

The two Pension Funds in question answered, admitting the salient allegation of the Complaint, namely, that pension benefits had been denied; however, they claimed that equity required a forfeiture of the pensions (J.A. 14). The Pension Funds further sought to interplead the Union out of fear that the Pension Funds "may be

exposed to double liability in that the Plaintiff (Guidry) has demanded payment . . . and Local 9 (the Union) . . . has also demanded payment of the same interest." (J.A. 14 and 15) (words in parenthesis added).

Subsequently, the District Court granted an order allowing the Union to intervene and, in turn, join the third Pension Fund into the action (J.A. 28). The Complaint by Intervenor Union (J.A. 29 and 31) asserted the factual background that Guidry had been a chief executive officer, business manager and financial secretary/treasurer of the Union, that he had embezzled from the Union, and had pled guilty to a one-count violation of 29 U.S.C. § 501(c). In the first five claims for relief, the Union sought a monetary judgment against Guidry on behalf of the Union, and in the sixth claim, asserted a claim for constructive trust on any pension benefits owed until the Union "is made whole for its losses." (J.A. 35). In his Answer to the Complaint of Intervenor, Guidry admitted the essential facts of the Complaint by Intervenor, but denied that a constructive trust was allowable. (J.A. 37).

Two of the three Pension Funds, in their Answer to Intervenor's Complaint, again raised the issue that Guidry's pension benefits were forfeitable, since "made in error." (J.A. 48 and 50). The third Pension Fund, however, Sheet Metal Workers Local No. 9 Pension Fund, simply admitted all allegations. (J.A. 51). Guidry had earlier settled a state court action with this third Pension Fund, as well as with a separate welfare fund, by a stipulation that he was owed $23,865.00 from the third Pension Fund. Guidry stipulated that $20,000.00 be paid to the surety of the welfare fund and Pension Fund, with Guidry being

entitled to receive the $3,865.00 balance. Guidry was further reinstated to his $645.00 a month pension with this third Pension Fund (J.A. 44-46).

Guidry and the Union then stipulated for entry of judgment in favor of the Union for $275,000.00 on the first five claims for relief in the Complaint by Intervenor Union (J.A. 52). The Union and Guidry then entered into a mutual release, except as to the judgment (J.A. 53). The District Court, on January 14, 1986, entered the $275,000.00 judgment with interest, and further, entered a Fed. R. Civ. P. 54(b) certification that judgment should immediately enter (J.A. 59). As judgment creditor, the Union then obtained the issuance of a Writ of Continuing Garnishment directed to all three Pension Funds for the $275,000.00, plus interest (J.A. 61). These Writs of Continuing Garnishment ordered each Pension Fund as garnishee, "to pay any nonexempt earnings to the Clerk of the Court . . . and attach a copy of the Calculation of Amount of Exempt Earnings used . . . " It further ordered the garnishee Pension Funds to deliver a copy of the Writ, which was to last 90 days, "together with the Calculation of Amount of Exempt Earnings" to the judgment debtor, Guidry, and to further calculate the amount of exempt earnings "each time you pay the Judgment Debtor (employee) for the remainder of the effective period." (J.A. 62 and 63).

The three Pension Funds then answered the Writs of Continuing Garnishment by denying that each held or possessed any personal property of Guidry, did not fill out any Calculation of the Amount of Exempt Earnings, and returned the various forms for each pay period in blank (J.A. 65 and 67). In turn, the Union traversed each

answer, asserting that the answer "was not answered correctly in that Garnishee owes a pension to Plaintiff/ Judgment Debtor Curtis Guidry, which pension is garnishable pursuant to federal law." (J.A. 71). Such Writs of Continuing Garnishment were issued for a second time in May 1986, with the answers similarly denying a possession or owing of assets belonging to Guidry, and with no calculation of nonexempt wages (J.A. 89 and 91). Similarly, the Union traversed the three answers, asserting that indeed the three Pension Funds owed Guidry a pension, which "is garnishable pursuant to federal law." (J.A. 95).

On July 17, 1986, the District Court heard oral argument on Guidry's Motion for Summary Judgment, the two originally-named Pension Funds' Cross-Motion for Summary Judgment, the Union's Motion for Summary Judgment on the constructive trust theory, and the Union's traverse to the various answers of the garnishee Pension Fund. (App. to Pet. for Cert. C-2, Lines 19-24). Guidry's Motion for Summary Judgment asserted that, as a matter of law, the Pension Funds violated ERISA by attempting to enforce forfeiture in violation of the nonforfeiture clause in 88 Stat. 854, 29 U.S.C. § 1053(a) (J.A. 16). The two originally named Pension Funds moved for Summary Judgment, based on equitable principles and Congressional objectives embodied in ERISA, that Guidry was not entitled to pension benefits (J.A. 18). Finally, the Union's Motion for Summary Judgment sought to uphold the pension benefits, but impose a constructive trust on all benefits owed Guidry from the three Pension Funds, until its prior judgment of $275,000.00, plus interest, was satisfied (J.A. 72 and 73).

After oral argument, the District Court entered a Memorandum Opinion and Order (App. to Pet. for Cert. B-1-5). The District Court granted Guidry's Motion for Summary Judgment, citing the nonforfeitability requirements in ERISA 29 U.S.C. § 1053(a), that each Pension Plan "shall provide that an employee's right to his normal retirement benefit is nonforfeitable" if the employee meets certain age and service requirements. The Court, after reviewing precedent, held:

> The defendants' assertion that Mr. Guidry never was eligible for benefits because of his misconduct is contrary to Section 1053(a) and precedent. Forfeiture is precluded even in these circumstances, and Mr. Guidry is entitled to his vested pension benefits as a matter of law. (App. to Pet. for Cert. B-3).

The District Court then, although finding it was "clear" that Guidry had a right to his pension benefits, granted the Union's Motion for Summary Judgment, interpreting federal labor legislation as *in pari materia*, with ERISA holding that, in these circumstances involving the Union, "a narrow exception to ERISA's anti-alienation provision is appropriate." (App. to Pet. for Cert. B-5). The District Court then imposed a constructive trust, until the prior $275,000.00 Union judgment, plus interest, was satisfied.

At the hearing on the various Motions for Summary Judgment and on the Union's traverse, counsel for Guidry raised the issue of the 75% exemption arising under the Consumer Credit Protection Act, 82 Stat. 163, 15 U.S.C. § 1673. The following exchange occurred between the District Court and Guidry's counsel on this issue of exemption:

> MR. SERRUTO: Your Honor, this eliminates the possibility of bringing before the court the issue of the exemptions to which Mr. Guidry needs to place before the Court.
>
> THE COURT: No. This isn't a garnishment. I am imposing a constructive trust. There are no exemptions. I am not going down the garnishment road.
>
> MR. SERRUTO: The position of the Court would then be he is entitled to no exemptions then?
>
> THE COURT: That's right. He doesn't get anything until $275,000 plus interest has been paid, the way I see it. (App. to Pet. for Cert. C-22).

In a Motion for a New Trial or to Alter, Amend and Vacate Judgment With Citation of Authority, Guidry again raised the 75% exemption issue, arguing that a "constructive trust" was "garnishment" within the meaning of 82 Stat. 163, 15 U.S.C. § 1672(c). Guidry further argued that the Consumer Protection Act prohibited attachment of more than 25% of any pension benefits (J.A. 98). The District Court entirely denied this Motion (J.A. 100).

An appeal then followed to the United States Court of Appeals for the Tenth Circuit, which affirmed the constructive trust and ruled the exemption issue had not been properly raised by Guidry. In its Judgment and Opinion (J.A. 102-118), the Court of Appeals recognized that the Courts of Appeals for the Second Circuit and Sixth Circuit have held that the anti-alienation language in Section 206 of ERISA, 29 U.S.C. § 1056(d)(l), was clear and not subject to judicial exceptions for criminal misconduct. The Court of Appeals, however, chose to follow the Courts of Appeals for the D.C. and Eleventh Circuits which have carved out a criminal misconduct exception,

and upheld the District Court's use of a constructive trust. With regard to the argument of Guidry that 75% of his pension benefits from the three Pension Funds was exempt as earnings in any event under the Consumer Credit Protection Act, 82 Stat. 163, 15 U.S.C. § 1672(a), the Court of Appeals found that such section did indeed "encompass the constructive trust levied in the instant case." (J.A. 115). The Court of Appeals, however, held that Guidry had not complied with the procedural requirements of Colorado's garnishment law, indicating that, " . . . Colorado places the burden of objecting to a writ of garnishment firmly upon the judgment debtor, . . . " (J.A. 117). The Court further found that Guidry had received a copy of the Writ of Garnishment "which both gave the calculation of nonexempt money owed to the Union and enumerated his right to object to the garnishment." (J.A. 117). Finding that Guidry had not then responded, the Court held that Guidry could not then raise the issue of the exemption. Thus, Guidry lost his three pensions entirely until the Union judgment of $275,000.00, plus interest, was satisfied.

After a Petition for Rehearing was denied, Guidry petitioned for a Writ of Certiorari to this Court, with certiorari being granted on June 26, 1989.

SUMMARY OF ARGUMENT

While there are numerous rules of statutory construction, the starting point of every case is to look at the plain meaning of the statutory language itself. *Ernst & Ernst v.*

Hochfelder, 425 U.S. 185, 197 (1976). Here, the various conflicting Courts of Appeals on the issue of whether to make a judicial exception to the anti-alienation clause of ERISA, 88 Stat. 864, 29 U.S.C. § 1056(d)(1) have engaged in the rigors of statutory construction, such as by reference, to legislative history, to other statutes which might be *in pari materia*, and to other sections of ERISA. The language of the anti-alienation clause, however, is quite clear, and in one sentence, Congress provided that, "Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated." Congress itself has provided three exceptions to this broad, clear and simple language in 29 U.S.C. § 1056(d)(2) and (3), none of which are applicable to the issue of employee misconduct. Thus, Congress reserved for itself the task of defining any exceptions.

The primary purpose of the enactment of ERISA was to provide security by way of retirement benefits to plan participants and their beneficiaries. In enacting the anti-alienation clause, Congress chose between conflicting policies, such as between the rights of creditors and the plan participants themselves. Such policy choices should not be interfered with by the creation of a judicially carved out exception, no matter how narrow or laudatory. As certain of the Courts of Appeals have held in refusing to impose exceptions to the anti-alienation clause, such judicial action would involve the courts in an endless stream of litigation, having to determine on a case-by-case basis how far to make any particular exception.

The hazards of exception-making by the judiciary are amply demonstrated in this case. The District Court, by way of three different Motions for Summary Judgment,

was faced with three competing claims to the pension benefits of Guidry. The Pension Funds maintained that Guidry was not entitled to any benefits whatsoever, and that by his misconduct, he had forfeited his rights despite ERISA's anti-forfeiture clause, 88 Stat. 854, 29 U.S.C. § 1053(a). The Union, which was owed a $275,000.00 judgment from Guidry, wanted the pension benefits awarded, but wanted to impose a constructive trust so that the Union would receive the benefits as satisfaction of its judgment. Guidry simply wanted his pension without alienation, and despite the judgment, consistent with the anti-alienation provisions in ERISA. Faced with these competing claims, the District Court, on the issue of forfeiture, refused to make any criminal misconduct exception to the anti-forfeiture clause. Yet, in order to reach the result granting the Union's right to the benefits, the Court then followed the line of reasoning which did allow exception-making to the anti-alienation clause. This inconsistency demonstrates that it is best for Congress to make policy decisions.

Even if this Court leaves the constructive trust in place and finds that a criminal misconduct exception to ERISA is in order, Guidry is entitled to a 75% exemption under the Consumer Credit Protection Act, 82 Stat. 163, 15 U.S.C. § 1673, as well as under the laws of Colorado. After receiving the judgment against Guidry for $275,000.00, the Union garnished the Pension Funds. Since the Motions for Summary Judgment by the Pension Funds were still pending on whether Guidry's pension had been forfeited, the Pension Funds in their Answers to the Writs denied owing funds to Guidry, and did not fill out a portion of the Writ in which the garnishee had a

duty to calculate exempt wages. Though the Court of Appeals held that Guidry had failed to object to the calculation of exempt earnings, Guidry had nothing to object to, since the Pension Funds were denying that any pension benefits were owing, and did not fill out the exemption form.

Further, once the constructive trust was imposed, Guidry's counsel, both in open Court and in a Motion, raised the 75% exemption; however, the District Court incorrectly stated the law in stating, "There are no exemptions. I am not going down that garnishment road." (App. to Pet. for Cert. C-22, Lines 19-25; and C-22, Lines 108).

Regardless of whether Guidry had any duty to object to a nonexistent calculation of exempt earnings, the Consumer Credit Protection Act is self-executing and there is no obligation by the judgment debtor to raise any exemption. This rule is obviously recognized in Colorado by the Colorado Rules of Civil Procedure and official Form, which require the garnishee, not the judgment debtor, to calculate exempt earnings.

The holding of a constructive trust over Guidry's pension benefits should be reversed and remanded as being violative of clear statutory language that pension benefits are not to be assigned or alienated. In the alternative, even if a constructive trust is upheld, Guidry is entitled to a 75% exemption arising under both federal and state law on all benefits.

ARGUMENT

1. THE PLAIN LANGUAGE OF ERISA'S ANTI-ALIENATION CLAUSE, AS WELL AS ITS LEGISLATIVE HISTORY AND SUBSEQUENT ADMINISTRATIVE RULINGS, LEAVE NO ROOM FOR JUDICIAL RULE MAKING.

A. The Plain Meaning of ERISA Section 206(d)(1) is self-evident.

The courts which have carved out a judicial criminal misconduct exception to ERISA's anti-alienation clause in Section 206(d)(1), 29 U.S.C. § 1056(d)(1), have used various general principles of statutory construction. The District Court in the instant case in carving out "a narrow exception" used the statutory construction aid of *in pari materia* in attempting to harmonize various Congressional acts intended to eliminate corrupt practices on the part of union officials, with ERISA. The Court of Appeals in this case used the statutory aid of comparing the anti-alienation provision in ERISA with other sections of ERISA in holding that Congress intended a broad variety of remedies to redress breaches of fiduciary duty. Despite the anti-alienation clause, the Court of Appeals ruled that the misconduct of Guidry (though not arising out of a breach of ERISA's fiduciary duty), must be redressed. Likewise, the Court of Appeals for the District of Columbia, in *Crawford v. La Boucherie Bernard, Ltd.*, 815 F.2d 117 (D.C. Cir., 1987), cert. denied, 108 S. Ct. 328 (1987), used the statutory construction aid of referring to legislative history to ascertain the Congressional intent of the anti-alienation provision of ERISA. The United States Court of Appeals for the Eleventh Circuit in *St. Paul Fire & Marine Ins. Co. v. Cox*, 752 F.2d 550 (C.A. 11, 1985), similarly

looked for Congressional intent to find Congress did not preclude application of equitable principles.

What all of these courts did, in an attempt to reach in their view a laudatory result, was to ignore the first principle of statutory construction. That principle is that there is no need for statutory construction if the meaning of the statute is plain and clear. Rules of statutory construction are not an end in themselves, but merely an aid. This Court has stated that, "The starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976). This axiom has been emphasized by this Court in *S & E Contractors, Inc. v. United States*, 406 U.S. 1, 14 n. 9 (1972), in quoting from Justice Holmes that, "We do not inquire what the legislature meant; we only ask what the statute means."

Section 206(d)(1) of ERISA, 29 U.S.C. § 1056(d) provides that, "(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated." The meaning of "assignment" and "alienation" are well-grounded in the common law. "Assignment" is a transfer, where the assignor's rights are extinguished, and the assignee acquires the right. RESTATEMENT (SECOND) OF CONTRACTS, SECTION 317(1). "Alienation" is a conveyance of property by any method from one to another. 3 C.J.S. *Alienation*, 771-772 (1973). Congress itself initially legislated two exceptions to this one sentence. These exceptions are contained in Section 206(d)(2) of ERISA, 29 U.S.C. § 1056(d)(2). In the initial enactment, Congress made exceptions for voluntary and revocable assignments not to exceed 10%, and

for the allowance that a participant or beneficiary could secure a loan from a plan with benefits. In 1984, Congress added a new exception allowing so-called "qualified domestic relations orders" for the benefit of spouses and children of plan participants, 98 Stat. 1433, 29 U.S.C. § 1056(d)(3). As shown by these three exceptions, Congress is well capable of legislating the scope and extent of anti-alienation and anti-assignment.

There is precedent in this Court in prior ERISA cases to show the disinclination of the Court to engage in judicial exception making to ERISA, whether through statutory construction or federal common law. In *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985), the Court was faced with an issue of whether Section 409(a) of ERISA, 88 Stat. 886, 29 U.S.C. § 1109(a), could be expanded to infer a private remedy against a plan fiduciary for extracontractual damages. The Supreme Court was reviewing a decision of the United States Court of Appeals for the Ninth Circuit, which used Section 409(a) of ERISA, 29 U.S.C. 1109(a), in order to expansively deal with Section 502(a) of ERISA, 88 Stat. 891, 29 U.S.C. § 1132(a). Section 409 of ERISA provides that courts have "such other equitable or remedial relief as the court may deem appropriate." This same section was used by the United States Court of Appeals for the Tenth Circuit in the instant case as justification for creating a federal common law exception to the anti-alienation provision of ERISA (J.A. 106). This Court, however, in *Massachusetts Mut. Life Ins. Co. v. Russell, id.* at P. 145, first observed that, "'The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide. *California v. Sierra Club*, 451 U.S. 287,

297 (1981).'" The Court then refused to use the catch-all provision in Section 409 of ERISA, and pointed out that the plain language of the "six carefully integrated civil enforcement provisions found in § 502(a) . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." *Id.*, at P. 146. The Court further stated that, "The assumption of inadvertent omission is rendered especially suspect upon close consideration of ERISA's interlocking, interrelated and interdependent remedial scheme . . . " *Id.*, at P. 146. Similarly in this case, there should be no need to look beyond the plain meaning of the anti-alienation provision, since there is simply no need for the application of rules of statutory construction. This is further buttressed by the fact that Congress itself created three limited exceptions to the anti-alienation clause, namely, a voluntary assignment of not more than 10% of the plan benefits, the allowance of giving plan benefits as security for a loan from the plan, and qualified domestic relation orders.

Similarly, this Court in *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 104 (1983), declined to expansively interpret Section 514(d) of ERISA, 88 Stat. 897, 29 U.S.C. § 1144(d). This section provides that ERISA is not to be construed "to alter, amend, modify, invalidate, impair or supersede any law of the United States." The Court refused to limit a more specific section of ERISA – the preemption provision, Section 514(a), 88 Stat. 897, 29 U.S.C. § 1144(a), by reading Section 514(d) as a "more general saving clause." *Id.*, at P. 104. Thus, the Court has already held that the overuse of Section 514(d) must be resisted, such as might

be attempted in this case, in order to dilute the anti-alienation clause.

It is clear, given the plain meaning of the anti-alienation clause, that judicial exception making, no matter how appealing, must be resisted based on the separation of powers contained within the United States Constitution. It is Congress who should decide competing public policies such as, whether the entitlement to funds by a pensioner takes precedence over the pensioner's criminal, civil, ethical or moral misconduct.

B. The Legislative Purpose As Shown In The Preamble, The Legislative History and Subsequent Authorized Administrative Interpretations All Bolster The Plain Meaning And Text Of The Anti-Alienation Clause.

Even if aids to statutory construction are used, such undertaking bolsters the plain meaning of the language in Section 206(d)(l) that, "benefits provided under the plan may not be assigned or alienated."

The over-all policy of ERISA as stated by Congress in its preamble, in passing this comprehensive law was "to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries . . . " 88 Stat. 832, 29 U.S.C. § 1001(b). The preamble, in further stating public policy, indicates that the Act is to bring about "the continued well-being and security of millions of employees and their dependents . . . " 29 U.S.C. § 1001(a).

An important tool used by Congress in ensuring the well-being and security of employees and their dependents was the enactment of the anti-alienation clause. At the same time, Congress amended the Internal Revenue Code, Section 401(a)(13), 88 Stat. 937, 26 U.S.C. § 401(a)(13), to require that, for a plan to be "qualified" for favorable tax benefits, a trust must meet the requirement that benefits not be assigned or alienated.

With regard to the legislative history, the final House Conference Report on ERISA states that the anti-assignment provision is designed so that an employee's accrued benefits indeed would be available on retirement. H.R. Rep. No. 93-807, 93rd Cong., 2nd Sess. 3, *reprinted in* 1974 U.S. Code Cong. & Ad. News P. 4670, 4734. The Joint House and Senate Conference Committee, with respect to the anti-alienation provision, stated, "For purposes of this rule, a garnishment or levy is not to be considered a voluntary assignment." H.R. Conf. Rep. No. 93-1280, 93rd Cong., 2nd Sess. 280, *reprinted in* 1974 U.S. Code Cong. & Ad. News P. 5038, 5061. Commentators suggest that one of the primary motives of Congress in enacting a broad anti-alienation section in ERISA was to avoid the past use by employers of forfeiture clauses in pre-ERISA retirement plans known as "bad boy" clauses. "Bad boy" clauses caused forfeitures for grounds such as employee misconduct or dishonesty.[1]

---

[1] See discussion in Note, *Weakening ERISA's Preemptive Powers: St. Paul Fire & Marine Ins. Co. v. Cox Creates an Implied Exception to the Anti-Alienation Provision for Employee Fraud,"* 6 Virginia Tax Review 185, 203-207 (1986).

As a corollary to the anti-alienation clause, ERISA also enacted a "nonforfeiture" clause contained in 29 U.S.C. § 1053(a). The legislative history of this section again reflects Congress' intent to preserve pension benefits for employees, except in certain otherwise defined exceptions. The Conference Report stated that, " . . . an employee's rights, once vested, are not to be forfeitable for any reason." H.R. Conf., Rep. No. 93-1280, 93rd Cong., 2nd Sess. 271, *reprinted in* 1974 U.S. Code Cong. & Ad. News P. 5038, 5052. This Court, in *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359 (1980), stated that ERISA is a "comprehensive and reticulated statute." (P. 361). With regard to the forfeiture clause, the Court, *id.*, at P. 375, stated as follows:

> Congress wanted to correct this condition by making sure that if a worker has been promised a defined pension benefit upon retirement – and if he has fulfilled whatever conditions are required to obtain a vested benefit – he actually will receive it.
>
> The anti-forfeiture clause assured that the pension plan itself would not be able to deprive a participant of retirement funds. Similarly, the anti-alienation provision carries out the Congressional policy of making sure that third party creditors, such as the Union, not obtain a participant's benefits.

Treasury Department regulations further bolster the clear language of the anti-alienation clause, that anti-alienation means no alienation, without exception.[2] Treas. Regulation § 1.401(a)(13)(b)(1), 26 C.F.R. 1.401(a)-13(b)(1) provides as follows:

---

[2] The Treasury Department and the Department of Labor both share responsibility for ERISA administration and

(Continued on following page)

> Under section 401(a)(13), a trust will not be qualified unless the plan of which the trust is a part provides the benefits provided under the plan may not be anticipated, assigned (*either at law or in equity*) alienated or subject to attachment, garnishment, levy, execution or other legal or equitable process. (Emphasis added).

The United States Court of Appeals for the Sixth Circuit in *General Motors Corp. v. Buha*, 623 F.2d 455, 462 (1980), recognized that the regulation in question "is a legislative rather than interpretive regulation . . . " In doing so, the Court cited *Batterson v. Francis*, 432 U.S. 416, 426 (1977), that courts must follow such a legislative regulation, unless in excess of statutory authority, arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. Even the three Courts of Appeals which have allowed implied criminal conduct exceptions to ERISA – *Crawford v. La Boucherie Bernard, Ltd.*, 815 F.2d 117 (D.C. Cir., 1987), cert. denied, 108 S.Ct. 328 (1987), *St. Paul Fire & Marine Ins. Co. v. Cox*, 752 F.2d 550 (C.A. 11, 1985), and *Guidry v. Sheet Metal Workers National Pension*

(Continued from previous page)

enforcement. Reorganization Plan No. 4 of 1978, § 101(a), 3 C.F.R. 332 (1979), *reprinted in* 92 Stat. 3790. Provisions of Title 1 of ERISA, including the anti-alienation clause, were initially to be administered by the Labor Department; however, the ERISA Reorganization Plan No. 4 of 1978 transferred to the Treasury Department the exclusive authority to issue interpretations of Section 206(d) of ERISA, along with the I.R.C. corollary provision 401(a)(13). Exec. Order No. 12,108, 44 Fed. Reg. 1065 (1978).

Fund (J.A. 102-118) – did not seek to invalidate these Treasury Regulations, but simply ignored them.[3]

C. Even If The Statutory Construction Concept Of *In Pari Materia* Is To Be Used, The Various Federal Retirement Statutes Should Be Used In Comparison To ERISA, Not Other More General Statutes.

Respondent Union will undoubtedly argue before this Court, as it did in the District Court, that its cause differs from all others previously before the courts because Guidry was a Union official who was a "knave" and defrauded his Union.[4]

Thus, Respondents will argue that, while ERISA may preempt state law, Section 514(a), 29 U.S.C. § 1144(a), ERISA preserves all other laws of the United States, Section 514(d), 29 U.S.C. § 1144(d). The "other laws" that the Union has in mind are specifically the Labor Management Relations Act, 1947, 61 Stat. 136, 29 U.S.C. § 141(b), and the Labor Management Reporting and Disclosure Act of

---

[3] As this Brief was ready to be printed, Guidry became aware of a just-issued decision by the Court of Appeals for the Tenth Circuit, which again deals with the anti-alienation clause of ERISA at 29 U.S.C. § 1056(d)(1). The case is entitled, *Federal Deposit Insurance Corporation v. Farha*, Case No. 87-1530, Slip Opinion filed June 13, 1989. Interestingly enough, the court cites much of the same legislative history cited by Guidry in this Brief to support its holding that, " . . . a qualified ERISA plan is generally protected from garnishment under state law." (P. 5 of Slip Opinion).

[4] While Guidry recognizes that contrition does not take away from the enormity of his act, at his Providency Hearing before the United States District Judge involving the criminal charge, Guidry told the judge as follows:

(Continued on following page)

1959, 73 Stat. 535, 29 U.S.C. § 501. ("LMRDA") The District Court below in fact read the statutes as giving justification for the so-called "narrow exception" created in ERISA (App. to Pet. for Cert. B-4 and B-5). As previously argued on P. 17 of this Brief, the Court in *Shaw v. Delta Airlines, Inc., supra,* has resisted an expansion of Section 514(d).

It should first be stated that the enactment of both these labor statutes mentioned above pre-date ERISA. If Congress, in enacting the later ERISA legislation, had wished to allow garnishment of the pension rights of a union official by a union, it could have well done so. Perhaps it is more persuasive, however, to point out that the attempt to reach a desired end by invoking a "special interest" statute directed for unions, would give rise to similar arguments by other "special interest" parties pointing to other federal policies. If a person breached a duty in any number of ways, such person's employer could similarly seek to garnish the employee's pension funds, claiming a special "narrow exception" to ERISA for themselves. This situation, if left unabated, would be *in pari materia* run amuck.

The concept of *in pari materia* proceeds under the supposition that several statutes on the same subject should be construed as if one law. *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972). It is clear, however, that rules of statutory construction should be applied only

---

(Continued from previous page)

> Well, Your Honor, I know I did wrong. I have been ready for this plea since in October, as far as I'm concerned, you can say you're sorry about things. I could stand here and say I'm sorry. I can't undo it. The only thing I can say is that I did it, and I am willing to plead guilty to it. (J.A. 80)

when the terms of a statute are ambiguous. *Hamilton v. Rathbone*, 175 U.S. 414, 421 (1899). It has previously been Guidry's argument that the language of the anti-alienation clause is clear and unambiguous; thus there is no need to use a rule of statutory construction.

If, however, the concept of *in pari materia* should be applied to divine the intent of the anti-alienation clause, there is a group of statutes which is certainly more purely *in pari materia* to ERISA's anti-alienation clause than the general policies of the labor statutes cited by the District Court. The other comparative statutes evidencing the same purpose as the anti-alienation clause in ERISA, namely, to secure retirement income, are contained in the Social Security Act, 49 Stat. 624, 42 U.S.C. § 407, the Railroad Retirement Act, 88 Stat. 1345, 45 U.S.C. § 231m(a), the Civil Service Retirement Act, 80 Stat. 583, 5 U.S.C. § 8346(a), and Veterans Benefits Act, 72 Stat. 1229, 38 U.S.C. § 3101(a). Since all of these statutes clearly identify a public policy against garnishment of retirement funds, ERISA, likewise, should be so read.[5]

One Court of Appeals case, *United Mine Workers of America v. W. A. Boyle*, 567 F.2d 112 (D.C. Cir., 1977), though pre-ERISA, shows judicial restraint in using LMRDA as a bar to payment of pension benefits to a union official. The court refused to interpret a general provision in section 501(a) of the LMRDA, 29 U.S.C. § 501(a), as overcoming a pre-ERISA spendthrift clause in the United Mine Workers Association Pension Fund, which prohibited attachment of funds of a union official, Tony Boyle. The court began with the same rule of

---

[5] This line of reasoning is more fully set forth in Note, *Employee Theft and ERISA: A Proposed Amendment To Garnish Pension Benefits*, 10 Cardozo Law Review 315, P. 328, Footnote 64 (1988).

statutory construction suggested by Guidry, namely, that one begins by looking at the plain language of a statute and should not engage in tortured construction. The court pointed out, *id.*, at P. 114, that the wrongful acts committed by Boyle had no connection with the pension trust fund itself. Similarly, in the instant case, the $275,000.00 judgment for which the Union sought a constructive trust against the Pension Funds, was a judgment due to wrongdoing against the Union, not the Pension Funds (J.A. 52). The court in *United Mine Workers of America v. W. A. Boyle, id.*, at P. 114, pointed out that the spendthrift provision of the pension trust voided the particular remedy of attachment, but Boyle "remains guilty, at fault, blameworthy and liable . . . " Similarly, Guidry remains "guilty, at fault, blameworthy and liable," but the punishment should not be extracted through the mechanism of a garnishment of his pension. This judicial analysis of a similar issue arising many years ago is still instructive. In *United Mine Workers v. Boyle, id.*, at P. 114, the court stated:

> The English language is marvelously flexible, yet precise. Had the Congress – or the settlors of the trust – at any time desired to provide for an offset of the pension ordinarily to be paid to any beneficiary of the trust by reason of any liability, specific or general, flowing from a beneficiary to the trust, either could have said so. This they did not do, and the language employed by Congress . . . plainly does not cover the spendthrift provision of the Pension Trust. That being so, we find no public policy, implicit or explicit, in section 501(a) which should cause this court to create another exception to the usual rule on spendthrift provisions.

Just as the above court found that a lawyer-drawn provision – a spendthrift clause – could not be overruled

by LMRDA, this Court should find that a Congressional enactment – ERISA – cannot be overruled by LMRDA through the judiciary.

2. THE HAZARDS OF JUDICIAL RULE MAKING ARE AMPLY DEMONSTRATED BY CERTAIN COURT DECISIONS AND BY THE FACTS IN THIS CASE.

A. Other Courts Have Correctly Refrained From Interfering With The Anti-Alienation Clause.

Prior to the issuance of the Court of Appeals' Opinion in this case, other courts have noted the risks to the plan participants, the plan administrator, and the courts, alike, of making exceptions to ERISA. This fear was initially described in a District Court decision, *Vink v. SHV North American Holding Corp.*, 549 F. Supp. 268 (S.D. N.Y., 1982). That case involved "a faithless employee who is seeking the protection of the law to force his former employer to remain faithful in its pension obligations to him." *Id.*, at P. 268. The court recognized that, " . . . if ever there was a case to carve out a 'fraud' exception to ERISA's nonforfeitability provisions, this might be such a case." *Id.*, at P. 273. The court, however, would not engage in judicial law-making and held as follows:

> Carving out an exception in this case would start a boundless stream of suits and disputes in which companies refused to pay pensions benefits to allegedly disloyal employees. Courts would then have to determine whether a fraud exception should apply only to felonies, or whether it should apply to misdemeanors and acts of negligence as well.

> Regulation is an imprecise science. Decisions about who and what should be regulated are for Congress to make, so long as such regulations do not offend the Constitution. (*Id.*, at P. 273).

Vink was quoted with favor by the United States Court of Appeals for the Second Circuit in *Ellis Nat. Bank of Jacksonville v. Irving Trust Co.*, 786 F.2d 466, 471 (C.A. 2, 1986), in which the court clearly indicated that, despite its equitable appeal, the criminal misconduct exception "undermines a fundamental purpose of ERISA that we believe should be modified, if at all, only by Congress." Similarly, the United States Court of Appeals for the Sixth Circuit in *United Metal Products v. National Bank of Detroit*, 811 F.2d 297 (C.A. 6, 1987), Cert. dis., 108 S. Ct. 1494 (1988), again recognized the emotional appeal to judicially created exceptions in noting that the case in question "presented an almost ideal case for creation of an implied exception to pension anti-alienation laws." *Id.*, at P. 300. That court however resisted, indicating that, "It is highly unlikely, however, that the majority of those cases would present the uncomplicated facts we see here. As a result, presented with competing applicants for pension funds, courts will find themselves engaging in a sensitive balancing of factual equities and conflicting policies." *Id.*, at P. 300. Similar sentiments were echoed by the United States Court of Appeals for the Seventh Circuit in *Cummings By Techmeier v. Briggs & Stratton*, 797 F.2d 383, 390 (C.A. 7th, 1986), cert. denied, 107 S. Ct. 648 (1986), where the court indicated that, " . . . where Congress has established an extensive regulatory network and expressly announced its intention to occupy the field, federal courts should not create additional rights under the rubric of federal common law."

If the criminal misconduct exception were allowed by this Court under the instant facts, then numerous questions would have to be determined by subsequent courts. For instance, courts would have to determine whether the fact that Guidry had been convicted of a felony was the determinative fact, or whether a plea of *"nolo contendere"* is sufficient to invoke the criminal misconduct exception. Further, the courts would have to decide whether to apply the exception if the wrongdoer had avoided criminal conviction due to a procedural matter, such as a violation of the defendant's right to a speedy trial. If the civil courts were to attempt to apply the exception in the absence of a criminal conviction, it would be important for the courts to determine whether a civil standard of "preponderance of the evidence" should be used to determine criminal misconduct, or whether the courts should use a "beyond a reasonable doubt" standard. Doubtlessly, there are other distinctions that would have to be drawn and redrawn as the courts struggle to define the outer limits of any exception. This, again, is a reason to leave the whole matter to Congressional decision-making.

The commentators have further pointed out that without a Congressional enactment, plan administrators are at risk in grappling between competing claims. This would especially be true in an instance such as this, where the interests of the union-employer, who is making contributions to the plan being administered, are at odds with the interest of the plan participant to whom the plan administrator owes a fiduciary duty. Section 409(a) of ERISA, 29 U.S.C. § 1109(a) provides that a plan fiduciary such as plan administrator can be held personally liable for any losses resulting from a breach of fiduciary duty.

One of those duties is to administer the plan in accordance with the provisions of the plan. See Section 404(a)(1)(D) of ERISA, 88 Stat. 877, 29 U.S.C. § 1104(a)(1)(D). The anti-alienation provision as required by Congress by Section 206(d) is such a provision of every plan. Counsel for the Pension Funds recognized this problem in stating to the District Court that the trustees of the Funds "had their own fiduciary obligations to interpret the plan in a fair and impartial manner . . . " (App. to Pet. for Cert. C-9, Lines 4-11). This dilemma was aptly stated in Note, *Attachment of Pension Benefits Under ERISA*, 74 Northwestern University Law Review 2, P. 255, 259 (1979), where the author states:

> . . . a plan administrator who complies with a state court order attaching the plan assets risks potential fiduciary liability for failure to administer the plan in accordance with its terms. At the same time, the administrator faces the possibility of a contempt citation for failure to comply with the state court order. In addition, if the administrator bows to the attachment order, the plan may be subject to possible disqualification from favored tax status for failure to comply with the anti-assignment requirement of the Internal Revenue Code.[6]

---

[6] Recognizing these problems and dilemmas, various commentators have suggested specific language for Congressional, as opposed to judicial, amendment of ERISA. See Note, *Employee Theft In ERISA: A Proposed Amendment to Garnish Pension Benefits*, 10 Cardozo Law Review, 315, 340 (1988); Note, *ERISA – Exceptions To The Anti-Alienation Provision: Strengthening ERISA's Protection Through A Fraud Amendment*, 10 Western

(Continued on following page)

The plan administrator could seek a declaratory judgment, but such action would not only be an undue expense to the plan, but delay any award of benefits.

B. The Hazards Of Judicial Exception To Legislative Mandate Are Clearly Shown By The Facts Of This Case.

The Pension Funds denied Guidry his claimed benefits (J.A. 5). In their Answers to Complaint for Interpleader by the Union in the second defense, two of the three Pension Funds denied that Guidry has accrued a right to a pension benefit (J.A. 48 and 50). Yet, despite this outlook, cognizant of their fiduciary duties to Guidry as a plan participant under ERISA, the three Pension Funds on two different occasions resolved the dilemma by resisting garnishment. This led the Union to assert in the Traverse that the answer of each garnishee Pension Fund "was not answered correctly in that Garnishee owes a pension . . . " (J.A. 71 and 95).

The District Judge in the instant case was also faced with a dilemma. Guidry, in his Motion for Summary Judgment, asserted that the pensions were not forfeited, due to the nonforfeiture provision of 29 U.S.C. § 1053(a) (J.A. 16). The Pension Funds, on the other hand, in their Motion for Summary Judgment sought forfeiture for the

---

(Continued from previous page)

New England Law Review, Issue 2, 317, 354 (1988); Note, *Weakening ERISA's Preemptive Powers: St. Paul Fire & Marine Insurance Co. v. Cox Creates an Implied Exception to Anti-Alienation Provision to Employee Fraud*, 6 Virginia Tax Review, 185, 217 (1986).

benefit of the Funds (J.A. 18). To the contrary, the Union, which had previously received a judgment on its first five claims for relief, moved for a constructive trust on the pension benefits themselves. The Union thus had to oppose forfeiture in order to gain relief by a constructive trust (J.A. 72). Faced with this divergence in motions, the District Court had to rule both as to the nonforfeiture clause in 29 U.S.C. § 1053(a), as well as the anti-alienation or anti-assignment clause in 29 U.S.C. § 1056(d)(1). If the Court adopted the view of certain courts that a judicial exception could be made due to employee misconduct to the nonforfeiture provision, then the Union would be denied an avenue to collect Guidry's pensions. On the other hand, the Court was faced with a certain inconsistency if it had to deny an exception to the nonforfeiture clause, in order to allow an exception in the non-alienation provision to let the Union have its constructive trust.

The District Court chose to be inconsistent. In granting Guidry's Motion for Summary Judgment that there was no forfeiture, the court chose to follow the line of cases resisting exception-making begun by *Vink v. SHV North America Holding Corp., supra,* and in fact cited such case (App. to Pet. for Cert. B-3). Yet, now that the pensions were effective by the granting of Guidry's Motion for Summary Judgment, the District Court had to assume the anomalous position of following the conflicting judicial rule making authority represented in *Ellis Nat. Bank of Jacksonville v. Irving Trust Co., supra,* and *St. Paul Fire & Marine Ins. Co. v. Cox, supra.* It did so by holding that in "the unique circumstances of the case before this court," a "narrow exception to ERISA's anti-alienation provision is appropriate." (App. to Pet. for Cert. B-4 and B-5).

The Court of Appeals for the Tenth Circuit, to reach a non-Congressionally mandated result, also had to mount the obstacles in its path in order to reach the desired result. It is clear that the constructive trust imposed by the District Court (J.A. 96) was simply to make a fund available to collect the $275,000.00 judgment, plus interest, that the Union only had obtained against Guidry (J.A. 59). Despite this fact, the Court of Appeals stated that the trust was imposed to allow recovery of "money embezzled by Mr. Guidry from the pension fund." (J.A. 103). While not attempting to ignore Guidry's wrongful act, it should be pointed out that Congressional intent behind ERISA was to choose between conflicting policies in deciding to uphold beneficiaries' rights to receive benefits under the pension plan over other policies, such as punishing wrongdoers. In the instant case, contrary to the Court of Appeals' holding, the constructive trust was instituted not to benefit the Pension Funds, but to pay a judgment of the Union itself (J.A. 59). Further, in a rush to reach a desired end, the Court of Appeals for the Tenth Circuit summarily dismissed in a footnote this Court's decision in *Mackey v. Lanier Collection Agency and Serv.*, 108 S. Ct. 2182 (1988), by stating that, despite this Court's statement that ERISA's anti-alienation provision precludes garnishment of pension funds, this Court "neither discussed in depth nor cited support for its statement regarding pension benefit plans." (J.A. 108-109 n. 4). Quite to the contrary, this Court in *Mackey v. Lanier Collection Agency and Serv., supra*, undertook a lengthy discussion concerning the contrast between the existence of an anti-alienation provision in a section in ERISA regarding

pension plans, and the lack of such provision concerning welfare benefit plans.[7]

In another ERISA case, *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359 (1980), this Court acknowledged that, with respect to another ERISA issue, "Although the impact of our holding on petitioners and others . . . may seem harsh, we have no doubt as to what Congress intended. We cannot give the statute a special reading for that brief period without distorting it for the remainder of its statutory life." *Id.*, at P. 386. The Court of Appeals did not follow this policy.

---

[7] As referenced in footnote 3, *supra*, the Court of Appeals for the Tenth Circuit has just issued another Opinion concerning the anti-alienation clause, as this Brief was being printed, *Federal Deposit Insurance Corporation v. Farha*, Case No. 87-1530, Slip Opinion filed June 13, 1989. While the Court of Appeals for the Tenth Circuit in the instant case gave little weight to this Court's holding in *Mackey v. Lanier Collection Agency and Serv., supra*, that ERISA's anti-alienation provision precludes garnishment, the new decision cites the same holding in *Mackey* and concedes that although dicta, it "played a significant role in the Court's reasoning, and we believe it bolsters our holding that 206(d)(1) protects participants' interests in qualified pension plans from commercial creditors." (P. 7 of Slip Opinion).

The Court of Appeals for the Tenth Circuit in *Federal Deposit Insurance Corporation v. Farha*, does reference its *Guidry* decision in footnote 2. (P. 7 of Slip Opinion). The Court of Appeals again makes an error in the footnote by stating that the limited exception for Guidry is to remedy his embezzlement of plan funds while trustee. This is simply not the fact, since the only party with a judgment against Guidry is the Union. Further, the court continues in insisting that the levies on ERISA pensions may be "authorized by other federal statutes," when in fact it has been the argument in this Brief that there are no other such federal statutes permitting such levy.

Though attractive to the Union, to deny Guidry his pension benefits by way of constructive trust, was not what Congress intended. As in *Nachman Corp. v. Pension Benefit Guar. Corp., supra,* allowing the District Court's so-called narrow exception for Guidry would distort the anti-alienation clause "for the remainder of its statutory life." This is an issue for Congress to decide, based on conflicting policy issues. For instance, Congress may well decide that the existing criminal statute such as the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 501(c) under which Guidry was convicted and given the maximum sentence (J.A. 31), provides sufficient penalties without depriving the guilty party of his pension. The deprivation of pension would create a potential that Guidry and any of his dependents could draw public assistance under other federal or state acts. This policy conflict was already resolved by Congress. If it is to be altered, it must be done by Congress, not the courts.

3. EVEN ASSUMING THAT THE CONSTRUCTIVE TRUST IS PERMISSIBLE UNDER THE ANTI-ALIENATION PROVISION OF ERISA, THE COURT OF APPEALS MISAPPREHENDED THE CLEAR FACTS AND LAW OF THIS CASE IN DENYING GUIDRY A 75% EXEMPTION UNDER THE CONSUMER CREDIT PROTECTION ACT, 15 U.S.C. § 1671, *ET SEQ.*

A. Colorado's Statute On Exemptions In Garnishment Incorporates The Consumer Credit Protection Act, And Further, Puts The Burden On The Garnishee, Not The Debtor, To Calculate Exemptions.

The exemption issue is only pertinent if this Court finds the anti-alienation clause does not prohibit the

constructive trust. Regarding the exemption issue, the Court of Appeals both misapprehended the clear facts of the case, and also the law, in denying Guidry his 75% exemption arising under both Colorado state law and federal law. As noted earlier, at the first of its Opinion, the court made a factual error, stating that the judgment obtained by the Union was for money embezzled by Guidry from the Pension Funds. The court made a second set of factual errors at the end of its Opinion on the exemption issues, in holding that Guidry failed to make any objection within a specified time allowed by Colorado Rules of Civil Procedure ("C.R.C.P.") 103, Section 6(a)(2) and Section 6(d)(1) and (2). The court, further in error, indicated that Guidry had received a copy of the Writ of Garnishment which gave the calculation of nonexempt money and then failed to object (J.A. 117).

The court, however, correctly gave the outline of the Consumer Credit Protection Act, 82 Stat. 163, 15 U.S.C. § 1673(a), namely, that only a maximum of 25% of an individual's weekly earnings may be garnished. 15 U.S.C. § 1672(a) defines "earnings" as including "periodic payments pursuant to a pension or retirement program." Further, "garnishment" is defined in 15 U.S.C. § 1672(c) as "any legal or equitable procedure through which the earnings of an individual are required to be withheld for any debt." The court acknowledged that the Consumer Credit Protection Act would encompass the constructive trust in the instant case (J.A. 115).

Colorado, in its garnishment act, has adopted similar definitions of "earnings" in Colorado Revised Statutes

("C.R.S.") 13-54.5-101(2), and for "garnishment" in C.R.S. 13-54.5-101(4). Colorado's garnishment law creates a particular statutory scheme for so-called "continuing garnishments" in C.R.S. 13-54.5-101, *et seq.* A "continuing garnishment" is defined as a procedure for withholding the "earnings" of a judgment debtor for successive pay periods. C.R.S. 13-54.5-101(1). However, the continuing garnishment is effective for a maximum of 90 days. C.R.S. 13-54.5-102(2). The Colorado legislature provided that the exemptions in the Consumer Credit Protection Act 15 U.S.C. § 1671, *et seq.*, "shall apply to all garnishments." C.R.S. 13-54.5-103(3). Finally, the legislature of Colorado provided that, "practice and procedure in garnishment actions instituted pursuant to this article," should be prescribed by the Supreme Court of Colorado. C.R.S. 13-54.5-111.

The Supreme Court of Colorado provided such practice and procedure by way of C.R.C.P. 103. Section 1 of C.R.C.P. 103 deals with writs of continuing garnishment. C.R.C.P. 103 Section 1, as well as the Form 26 to the Rules are reproduced in full in Appendix A to this Brief (App. 1-16). Under Subsection (g) of Section 1, "Exemptions," the rule provides that a garnishee such as the Pension Funds, is not required to deduct, set up or plead any exemption for the judgment debtor "excepting as set forth in the writ." Subsection (b) of Section 1 provides that a writ of continuing garnishment shall be in a prescribed form in the C.R.C.P. Appendix of Forms. Form 26 to the Appendix of Forms to the C.R.C.P. provides such a form for writs of continuing garnishment. Among other

instructions, the form (App. 10-16 to this Brief) orders the garnishee to pay only "nonexempt earnings" to the clerk of the court, and to "attach a copy of the Calculation of Amount of Exempt Earnings used . . . " The form further orders the garnishee to deliver a copy of the writ of continuing garnishment "together with the Calculation of the Amount of Exempt Earnings, at the first time you pay the judgment debtor (employee)." The form further has a notice to the judgment debtor, which contains as follows:

> A. Your employer may only withhold nonexempt earnings from your wages, salaries or commissions, but in no event more than the Principal Balance/ Total Amount Due and Owing . . .
>
> B. If you disagree with the amount withheld, you must make a good faith effort to talk to your employer within five days after being paid.
>
> C. If you cannot settle the disagreement with your employer, you may file a written objection with the clerk of the court . . . stating, under oath, the specific mistake in the Calculation of the Amount of Exempt Earnings.

Thus, Colorado clearly has created a scheme, where the garnishee, not the judgment debtor, must initiate the exemption calculation.

B. Since The Garnishee Pension Funds Never Calculated The Amount Of Exempt Earnings, Guidry Had No Reason To Object To A Blank Form, Even Though The Exemption Was Raised To The District Court.

The comparison of this Colorado official Form 26, with the writs of continuing garnishment issued by the

Clerk of the United States District Court to the Pension Funds (J.A. 61 and 85), shows that the Clerk in fact followed the official Form 26 attached to C.R.C.P. 103, Section 1. This is shown in that, "(C.R.C.P. No. 26)" is printed at the top of the forms issued by the Clerk. Indeed, the writs to the Pension Funds give an order to the garnishee Pension Funds to pay "any nonexempt earnings" and to "attach a copy of the Calculation of the Amount of Exempt Earnings used." As the Court can see from both Answers to Writs of Garnishment, the garnishee Pension Funds did not fill in the Calculation of Amount of Exempt Earnings for the first pay period (J.A. 65 and 89), or any additional pay periods as required by the form (J.A. 69 and 93). This is undoubtedly because the garnishee Pension Funds denied owing any sums to Guidry, since the District Court had yet to rule on their Motion for Summary Judgment that there was a forfeiture and Guidry was entitled to no pension funds (J.A. 67 and 91). Thus, the Court of Appeals was wrong in ruling that Guidry had "received a copy of the writ of garnishment which both gave the calculation of the nonexempt money owed to the Union and enumerated his right to object to the garnishment." (J.A. 117). This was an impossibility, due to the fact that the Pension Funds did not fill out the calculation on exempt earnings. It is clear from the provisions in the writs in this case, as well as from C.R.C.P. 103, that Guidry had no duty to consult with his employer in good faith, and thereafter, file a written objection with the clerk of the Court, since the condition precedent of calculation had not occurred. The Court of Appeals faults Guidry for failing to bring his exemption

to the District Court's attention (J.A. 117); however, that issue was not yet even ripe.

Also contradicting the holding of the Court of Appeals that Guidry waived his right to exemption by inaction, is that counsel for Guidry repeatedly raised the issue of exemption to the District Court, even after the constructive trust was imposed. This is demonstrated by the exchange between the court and Guidry's counsel at the hearing on the Motions for Summary Judgment in which the Court imposed the constructive trust:

> MR. SERRUTO: Your Honor, this eliminates the possibility of bringing before the court the issue of the exemptions to which Mr. Guidry needs to place before the Court.
>
> THE COURT: No. This isn't a garnishment. I am imposing a constructive trust. There are no exemptions. I am not going down the garnishment road.
>
> MR. SERRUTO: The position of the Court would then be he is entitled to no exemptions then?
>
> THE COURT: That's right. He doesn't get anything until $275,000 plus interest has been paid, the way I see it. (App. to Pet. for Cert. C-22).

In his Motion for New Trial or to Alter, Amend or Vacate Judgment with Citation of Authority, counsel for Guidry again pointed out to the District Court that the constructive trust was indeed a "garnishment" within the meaning of 15 U.S.C. § 1672(c), and that the Consumer Credit Protection Act would "prohibit attachment of more than 25% of all such benefits." (J.A. 98). The Court then denied such Motion entirely (J.A. 100). It should again be pointed out that in the rush to do equity and

create a "narrow exception" to redress the aggrieved Union in this case, both the District Court and the Court of Appeals ignored clear statutory language and policies contained in ERISA, the Consumer Credit Protection Act, and the Colorado Revised Statutes.

C. Regardless Of Colorado Law And Procedures, The Consumer Credit Protection Act Mandates That Exemptions Are Self-Executing.

Even if Guidry had the burden under Colorado state law of bringing the exemption to the Court's attention and failed to do so, the Secretary of Labor, who is empowered to enforce the Consumer Credit Protection Act by 82 Stat. 164, 15 U.S.C. § 1676, has issued a regulation interpreting 15 U.S.C. § 1673(a) and (c), which makes the exemption self-executing. The regulation provides that such sections do not require "the raising of the subsection (a) restrictions [§ 303(a), 15 U.S.C. § 1673(a)] as affirmative defenses in garnishment proceedings." (Citation in brackets added). Department of Labor Regulation 29 C.F.R. 870.51(c). Various courts have adopted this interpretation and held that percentage limitations need not be timely or personally demanded under state law on the threat of being waived. See *Donovan v. Hamilton County Municipal Court*, 580 F. Supp. 554, 557 (S.D. Ohio, 1984), and *Hodgson v. Cleveland Municipal Court*, 326 F. Supp. 419, 431 (N.D. Ohio, 1971). Similarly, Colorado has recognized the supremacy of the Consumer Credit Protection Act over state law in a garnishment case. In *First*

Nat. Bank of Denver v. Columbia Credit Corp., 499 P.2d 1163 (Colo. 1972), the Colorado Supreme Court recognized that federal law pre-empted state law on garnishment restrictions. As stated above, the federal law and interpretations by the Secretary of Labor provide that garnishments are self-executing. Thus, even if Guidry should have objected, he had no duty to do so under federal law and his 75% exemption, even if the constructive trust is upheld, must remain intact.

CONCLUSION

It is respectfully requested that this Court uphold the clear statutory language of the anti-alienation clause in ERISA and leave to Congress the prerogative to make legislative exceptions. The decision of the Court of Appeals should be reversed, with directions to the Court of Appeals to direct the District Court to dissolve the constructive trust and reinstate Guidry's full benefits under all three pension plans, along with a determination of Guidry's claim for interest, costs and reasonable attorney's fees arising under ERISA, 29 U.S.C. § 1132(g).

In the alternative, if the Court does uphold the constructive trust, it is respectfully requested that that portion of the Court of Appeals' ruling that Guidry failed to properly claim his exemption be reversed, with a direction to the Court of Appeals to direct the District Court to order the garnishee Pension Funds to calculate exempt earnings and pay over to Guidry any nonexempt earnings

wrongfully deprived, along with interest and other appropriate relief.

August, 1989

Respectfully submitted,

ELDON E. SILVERMAN
SCOTT GELMAN
SILVERMAN AND GELMAN, P.C.
1600 Stout, Suite 1000
Denver, Colorado 80202
(303) 573-5266

KENNETH T. EICHEL
ROBERT E. PENNINGTON
ELROD, KATZ, PREEO & LOOK, P.C.
1120 Lincoln, Suite 1100
Denver, Colorado 80203
(303) 832-1900

(Counsel for Petitioner)

APPENDIX A
COLORADO REVISED STATUTES

13-54.5-101. Definitions. As used in this article, unless the context otherwise requires:

(1) "Continuing garnishment" means any procedure for withholding the earnings of a judgment debtor for successive pay periods for payment of a judgment debt.

(2) "Earnings" means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, avails of any pension or retirement benefits, or deferred compensation plan, avails of health, accident, or disability insurance, or otherwise. For the purposes of writs of garnishment which are the result of a judgment taken for arrearages for child support or for child support debt, "earnings" also means workmen's compensation benefits and avails of any pension or retirement benefits, including but not limited to those paid pursuant to article 64 of title 22, articles 51 and 54 of title 24, and article 30 of title 31, C.R.S.

(3) "Garnishee" means a person other than a judgment creditor or judgment debtor who is in possession of earnings or property of the judgment debtor and who is subject to garnishment in accordance with the provisions of this article.

(4) "Garnishment" means any procedure through which the property or earnings of an individual in the possession or control of a garnishee are required to be withheld for payment of a judgment debt.

* * *

13-54.5-102.* Continuing garnishment – creation of lien. (1) In addition to garnishment proceedings otherwise available under the laws of this state in any case in which a money judgment is obtained in a court of competent jurisdiction, the judgment creditor or its assignees shall be entitled, on notice to the judgment debtor by section 13-54.5-105, to apply to the clerk of such court for garnishment against any garnishee who is an employer of the judgment debtor. To the extent that the earnings are not exempt from garnishment, such garnishment shall be a lien and continuing levy upon the earnings due or to become due to the judgment debtor at the time the writ of garnishment is served on the garnishee.

(2) Garnishment pursuant to subsection (1) of this section shall be a lien and continuing levy against said earnings due until such time as the employment relationship is terminated, the underlying judgment is vacated, modified, or satisfied in full, the writ is dismissed, or ninety days have expired since service of the writ, whichever is sooner; except that a continuing garnishment may be suspended for a specified period of time by the judgment creditor upon agreement with the judgment debtor, which agreement shall be in writing and filed by the judgment creditor with the clerk of the court in which the judgment was entered and a copy of which shall be delivered by the judgment creditor to the garnishee.

* *Subsections (1) and (2) were amended effective July 1, 1988 with this Appendix not reflecting the amendment.*

(3) Garnishment pursuant to subsection (1) of this section shall apply only to proceedings against the earnings of a judgment debtor who is a natural person.

* * *

13-54.5-103. Property or earnings subject to garnishment. (1) Any earnings owed by the garnishee to the judgment debtor at the time of service of the writ of continuing garnishment upon the garnishee and all earnings accruing from the garnishee to the judgment debtor from such date of service up to and including the ninetieth day thereafter shall be subject to the process of continuing garnishment.

(2) Any indebtedness, intangible personal property, or tangible personal property capable of manual delivery, other than earnings, owned by the judgment debtor and in the possession and control of the garnishee at the time of service of the writ of garnishment upon the garnishee shall be subject to the process of garnishment.

(3) Notwithstanding the provisions of subsections (1) and (2) of this section, the exemptions from garnishment required or allowed by law, including but not limited to exemptions provided by sections 13-54-102 and 13-54-104 and 15 U.S.C. sec. 1671 et seq., shall apply to all garnishments.

* * *

13.54.5-105. Notice to judgment debtor in continuing garnishment. In a case of continuing garnishment, the judgment creditor shall serve two copies of the writ of continuing garnishment upon the garnishee, one copy of which the garnishee shall deliver to the judgment debtor

as provided in section 13-54.5-107. Such writ shall include notice to the judgment debtor of the formula used to calculate the amount of exempt earnings owed to the judgment debtor for a single pay period and the amount of nonexempt earnings payable to the judgment creditor for a single pay period, and such writ shall contain notice to the judgment debtor of his right to object to such calculation of exempt and nonexempt earnings and his right to a hearing on such objection.

COLORADO RULE OF CIVIL PROCEDURE 103.* GARNISHMENT

This rule sets forth the exclusive process for garnishment. There shall be five (5) types of writs: (1) Writ of Continuing Garnishment, (2) Writ of Garnishment with Notice of Exemption and Pending Levy, (3) Writ of Garnishment for Support, (4) Writ of Garnishment – Judgment Debtor Other Than Natural Person, and (5) Writ of Garnishment in Aid of Writ of Attachment.

SECTION 1. WRIT OF CONTINUING GARNISHMENT (ON EARNINGS OF A NATURAL PERSON)

(a) Definitions.

(1) "Continuing garnishment" means the exclusive procedure for withholding the earnings of a judgment debtor for successive pay periods for payment of a judgment debt other than a judgment for support as provided in subsection (c) of this rule.

(2) "Earnings" means any compensation paid for payable for personal services, whether denominated as wages, salary, commission, bonus, avails of any pension or retirement benefits or other deferred compensation plan, avails of health, accident, or disability insurance or otherwise.

(b) Form of Writ of Continuing Garnishment and Related Forms. A writ of continuing garnishment shall be in the form and content of Appendix to Chapters 1 to 17, Form 26, C.R.C.P. It shall also include at least four (4)

---

* *This form was amended effective July 1, 1989 with this Appendix not reflecting the amendment.*

"Calculation of Amount of Exempt Earnings" forms to be in the form and content of Appendix to Chapters 1 to 17, Form 27, C.R.C.P. Objection to the calculation of exempt earnings shall be in the form and content of Appendix to Chapters 1 to 17, Form 28, C.R.C.P.

(c) When Writ of Continuing Garnishment Issues. After entry of judgment when a writ of execution can issue, a writ of continuing garnishment against earnings shall be issued by the clerk of the court upon request. Under a writ of continuing garnishment, a judgment creditor may garnish earnings except to the extent such earnings are exempt under law. Issuance of a writ of execution shall not be required.

(d) Service of Writ of Continuing Garnishment. A judgment creditor shall serve two (2) copies of the writ of continuing garnishment upon the garnishee, one copy of which the garnishee shall deliver to the judgment debtor as provided in subsection (h)(1) of this rule. Service of the writ shall be in accordance with C.R.C.P. 4, and the person who serves the writ shall note the date and time of such service on the return service. In any civil action, a judgment creditor shall serve no more than one writ of continuing garnishment upon any one garnishee for the same judgment debtor during any ninety (90) day period.

(e) Jurisdiction. Service of a writ of continuing garnishment upon the garnishee shall give the court jurisdiction over the garnishee and any earnings of the judgment debtor within the control of the garnishee.

(f) Effective Period.

(1) A writ of continuing garnishment shall be a lien and continuing levy against the nonexempt earnings of the judgment debtor until such time as the employment relationship is terminated, the underlying judgment is vacated, modified or satisfied in full, the writ is dismissed, or ninety (90) days have expired since service of the writ, whichever is sooner, except when such writ is suspended pursuant to subsection (j) of this rule.

(2) When a writ of continuing garnishment is served upon a garnishee during the effective period of a prior writ, for the purpose of this subsection (f)(2), service of any subsequent writ shall be deemed effective from the time the liens of all prior writs have terminated.

(3) If a writ of garnishment for support pursuant to C.R.S. 14-14-105 is served during the effective period of a writ of continuing garnishment, the effective period shall be tolled and all priorities preserved until the termination of the writ of garnishment for support.

(g) Exemptions. A garnishee shall not be required to deduct, set up or plead any exemption for or on behalf of a judgment debtor excepting as set forth in the writ.

(h) Delivery of Copy to Judgment Debtor.

(1) The garnishee shall deliver a copy of the writ of continuing garnishment, together with the calculation of the amount of exempt earnings, to the judgment debtor at the time the judgment debtor receives earnings for the first pay period affected by such writ.

(2) For all subsequent pay periods affected by the writ, the garnishee shall deliver a copy of the calculation

of the amount of exempt earnings to the judgment debtor at the time the judgment debtor receives earnings for that pay period.

(i) Objection to Calculation of Amount of Exempt Earnings. A judgment debtor may object to the calculation of exempt earnings. A judgment debtor's objection to calculation of exempt earnings shall be in accordance with Section 6 of this rule.

(j) Suspension. A writ of continuing garnishment may be suspended for a specified period of time by the judgment creditor upon agreement with the judgment debtor, which agreement shall be in writing and filed by the judgment creditor with the clerk of the court in which judgment was entered and a copy shall be delivered by the judgment creditor to the garnishee. No suspension shall extend the running of the ninety (90) day effective period nor affect priorities.

(k) Answer and Tender of Payment by Garnishee.

(1) The garnishee shall answer the writ of continuing garnishment no less than five (5) nor more than ten (10) days following the time the judgment debtor receives earnings for the first pay period affected by such writ, or forth (40) days following the date such writ was served pursuant to Section 1(d) of this rule, whichever is less.

(2) The garnishee shall pay any nonexempt earnings and deliver a calculation of the amount of exempt earnings to the clerk of the court which issued such writ no less than five (5) nor more than ten (10) days following the time the judgment debtor receives earnings affected by such writ.

(3) Any writ of continuing garnishment served upon the garnishee while any previous writ is still in effect shall be answered by the garnishee with a statement that the garnishee has been previously served with one or more writs of continuing garnishment and/or writs of garnishment for support and specify the date on which such previously served writs are expected to terminate.

(l) Disbursement of Garnished Earnings.

(1) If no objection is filed by the judgment debtor within five (5) days of the receipt of nonexempt earnings by the clerk of the court, the clerk shall disburse said funds to the judgment creditor without further application or order and enter the disbursement in the court records. The judgment creditor shall refund to the clerk of the court any disbursement in excess of the amount necessary to satisfy the judgment.

(2) If a written objection to the calculation of exempt earnings is filed with the clerk of the court, the garnished nonexempt earnings shall be placed in the registry of the court pending further order of the court.

* * *

FORM 26* TO APPENDIX OF FORMS OF COLORADO RULES OF CIVIL PROCEDURE
WRIT OF CONTINUING GARNISHMENT

___ COURT, ___ COUNTY, COLORADO

Case No. ___ Div./Ct. Rm. ___

WRIT OF CONTINUING GARNISHMENT

Plaintiff(s)

vs.

Defendant(s)

Judgment Debtor's name, last known address, other identifying information _____

_____

1. Original Amount of Judgment Entered _____ (date) $ _____
2. Plus any Interest Due on Judgment (____% per annum) + $ _____
3. Taxable Costs (including estimated cost of service of this Writ) + $ _____
4. Less any Amount Paid - $ _____
5. Principal Balance/Total Amount Due and Owing = $ _____

I affirm that I am authorized to act for the Judgment Creditor and that this is a true and correct statement as of _____ (date).

_____

* *This form was amended effective July 1, 1989 with this Appendix not reflecting the amendment.*

Subscribed under oath before me on _____

_____
Signature (Type Name, Title, Address and Phone below)

_____
Notary Public or Deputy Clerk
My Commission Expires: _____

WRIT OF CONTINUING GARNISHMENT

THE PEOPLE OF THE STATE OF COLORADO to the Sheriff of any Colorado County, or to any other person over the age of 18 years who is not a party to this action.

You are directed to serve TWO COPIES of this Writ of Continuing Garnishment upon _____, Garnishee, with proper return of service to be made to the Court.

TO THE GARNISHEE:

YOU ARE HEREBY SUMMONED AS GARNISHEE IN THIS ACTION AND ORDERED:

a. To answer the following questions under oath and to file your answers with the Clerk of the Court no less than 5 nor more than 10 days following the time you pay the Judgment Debtor for the first time following service of this Writ of Continuing Garnishment, or 40 days following service of this Writ upon you, whichever is less. *YOUR FAILURE TO ANSWER THIS WRIT OF CONTINUING GARNISHMENT WILL RESULT IN THE ENTRY OF A DEFAULT AGAINST YOU.*

b. To pay any nonexempt earnings to the clerk of the court no less than 5 nor more than 10 days following each time you pay the judgment debtor (employee) during the effective period of this writ and attach a copy of the Calculation of the Amount of Exempt Earnings used (the calculation under "Questions to be Answered by Garnishee" should be used for the first pay period, and one of the multiple calculation forms included with this Writ should be used for all subsequent pay periods).

c. To deliver a copy of this Writ of Continuing Garnishment, together with the Calculation of the Amount of Exempt Earnings, at the first time you pay the judgment debtor (employee).

d. To deliver a copy of each subsequent Calculation of the Amount of Exempt Earnings each time you pay the judgment debtor (employee) for the remainder of the effective period.

e. MAKE CHECKS PAYABLE AND MAIL TO THE CLERK OF THE _____ COURT AT _____. PLEASE PUT THE CASE NUMBER (shown above) ON THE CHECK.

_____, CO. _____
CLERK OF THE COURT

BY: _____
Deputy Clerk

DATE: _____

YOU ARE NOTIFIED (Employer also read "Notice to Judgment Debtor" below)

a. This Writ of Continuing Garnishment applies to all nonexempt earnings owed or owing during the 90 days following service of this writ or until you have paid to the clerk of the court the amount shown on Line 5 on the front of this writ, whichever occurs first. *However, if you have already been served with a writ of continuing garnishment or writ of garnishment for child support, this new writ is effective for the 90 days after any prior writ terminates.*

b. The following portion of any wages, salaries or commissions garnished is exempt from this Writ of Continuing Garnishment (See "Exemption Chart" below).

c. In no case may you withhold any amount greater than the Principal Balance/Total Amount Due and Owing (Line 5 on the front of this writ)

QUESTIONS TO BE ANSWERED BY GARNISHEE

The following questions MUST be answered by you under oath:

a. On the date and time this Writ of Continuing Garnishment was served upon you, was the judgment debtor employed by you?

___ YES ___ NO

If YES, state how the judgment debtor is paid:

___ weekly ___ bi-weekly ___ semi-monthly ___ monthly ___ other

The judgment debtor will be paid on the following dates during the 90 day effective period:

_____

b. Are you under one or more writs of continuing garnishment or writ of garnishment for child support against the judgment debtor?

___ YES ___ NO

If YES, state the date on which all such writs are expected to terminate _____

c. If the judgment debtor is employed and you answered NO to question b, complete the following Calculation for the "first pay period" following service of this writ.

CALCULATION OF THE AMOUNT OF EXEMPT EARNINGS (First Pay Period)

Gross Pay for the First Pay Period from ___ thru ___ $ _____

Less Deductions Required by Law (For Example, Withholding Taxes, FICA) - $ _____

Disposable Earnings (Gross Pay less Deductions) = $ _____

Less Statutory Exemption (Use Exemption Chart Below) - $ _____

AMOUNT TO BE WITHHELD AND PAID TO THE CLERK OF THE COURT = $ _____

EXEMPTION CHART

PAY PERIOD	AMOUNT EXEMPT IS GREATER OF
Weekly	30 x Federal Minimum Hourly Wage or 75% of Disposable Earnings
Bi-weekly	60 x Federal Minimum Hourly Wage or 75% of Disposable Earnings
Semi-monthly	65 x Federal Minimum Hourly Wage or 75% of Disposable Earnings
Monthly	130 x Federal Minimum Hourly Wage or 75% of Disposable Earnings

I declare, under oath, that I am authorized to act for the Garnishee in this action, that the above answers are true and correct, and that I have delivered a copy of this writ, together with the Calculation of the Amount of Exempt Earnings, to the judgment debtor at the time earnings were paid for the above First Pay Period (if earnings were paid).

Subscribed under oath before me on _____ (date)

_____
Signature
(Type Name, Title, Address and Phone below)

_____
Notary Public

My Commission Expires: _____

NOTICE TO JUDGMENT DEBTOR

A. Your employer may only withhold nonexempt earnings from your wages, salaries or commissions, but in no event more than the Principal Balance/Total Amount Due and Owing (Line 5 on the front of this writ).

B. If you disagree with the amount withheld, you must make a good faith effort to talk to your employer within 5 days after being paid.

C. If you cannot settle the disagreement with your employer, you may file a written objection with the clerk of the court issuing this writ within 10 days after being paid, stating, under oath, the specific mistake in the Calculation of the Amount of Exempt Earnings. YOU MUST USE AN APPROVED FORM which may be obtained from the clerk of the court.

D. You are entitled to a court hearing on your written objection to the calculation of the amount of exempt earnings.

E. Your employer cannot fire you because your earnings have been garnished. If your employer discharges you in violation of your legal rights, you may, within 90 days, bring a civil action for the recovery of wages lost because you were fired and for an order requiring that you be reinstated. Damages will be your lost wages, not to exceed six weeks, costs and reasonable attorney's fees.

RETURN OF SERVICE

State of Colorado)
)
County of ___)

I, ___, swear or affirm that I served two copies of the Writ of Continuing Garnishment on ___, 198___, at ___ o'clock ___M., by _____ .

Subscribed under oath before me on _____ .
(date)

_____
Signature

_____ Service Fee $ _____
Notary Public

My Commission Expires: _____

[Adopted effective January 1, 1985.]

AMICUS CURIAE

BRIEF

No. 88-1105

Supreme Court, U.S.
FILED
AUG 9 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

CURTIS GUIDRY, PETITIONER

v.

SHEET METAL WORKERS NATIONAL PENSION FUND, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

KENNETH W. STARR
Solicitor General
DAVID L. SHAPIRO
Deputy Solicitor General
CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROBERT P. DAVIS
Solicitor of Labor
ALLEN H. FELDMAN
Associate Solicitor
MARY-HELEN MAUTNER
Counsel for Appellate Litigation
ELLEN L. BEARD
Attorney
Department of Labor
Washington, D.C. 20210

QUESTIONS PRESENTED

1. Whether the anti-alienation provision of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. 1056(d)(1), bars the imposition of a constructive trust on the pension benefits of a former union officer who embezzled union funds.

2. If ERISA does not bar such a remedy, whether 75 percent of petitioner's monthly pension benefits are protected from garnishment by the federal Consumer Credit Protection Act, even if petitioner did not object to the garnishment in accordance with the procedural requirements of state garnishment law.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	3
Summary of argument	8
Argument:	
I. ERISA's anti-alienation provision bars imposition of a constructive trust on the pension benefits of a former union officer who embezzled union funds	10
A. ERISA's anti-alienation provision prohibits garnishment of pension benefits	10
B. This Court should not infer a general criminal misconduct exception to ERISA's anti-alienation clause for the benefit of employers	13
C. The facts of this case do not warrant recovery on the ground that a fiduciary has breached his duty to a pension plan	17
D. The remedial provision of the Labor-Management Reporting and Disclosure Act does not override ERISA's anti-alienation clause	20
II. If ERISA does not bar the constructive trust, the Consumer Credit Protection Act protects 75 percent of petitioner's monthly pension benefits	25
Conclusion	28

TABLE OF AUTHORITIES

Cases:

AT&T v. *Merry*, 592 F.2d 118 (2d Cir. 1979) 5
Alessi v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981) 14, 15
Christ Hospital v. *Greenwald*, 82 Ill. App. 3d 1024, 403 N.E.2d 700 (1980) 11
Commercial Mortgage Ins., Inc. v. *Citizens National Bank*, 526 F. Supp. 510 (N.D. Tex. 1981) 11
Crausman v. *Curtis-Wright Corp.*, 676 F. Supp. 1302 (D.N.J. 1988) 17
Crawford v. *La Boucherie Bernard Ltd.*, 815 F.2d 117 (D.C. Cir.), cert. denied, 108 S. Ct. 328 (1987) 6, 17, 18

Cases – Continued: Page

Donovan v. *Hamilton County Municipal Court*, 580 F. Supp. 554 (S.D. Ohio 1984) 27
Dyche v. *Dyche*, 570 S.W.2d 293 (Mo. 1978) 27
Ellis National Bank v. *Irving Trust Co.*, 786 F.2d 466 (2d Cir. 1986) 5, 13, 14, 19
FDIC v. *Farha*, No. 87-1530 (10th Cir. June 13, 1989) ... 12
Fremont v. *McGraw-Edison Co.*, 606 F.2d 752 (7th Cir. 1979), cert. denied, 445 U.S. 951 (1980) 15
General Motors Corp. v. *Buha*, 623 F.2d 455 (6th Cir. 1980) 4, 11
Helmsley-Spear, Inc. v. *Winter*, 74 A.D.2d 195, 426 N.Y.S.2d 778 (1980), aff'd, 52 N.Y.2d 984, 419 N.E.2d 1078, 438 N.Y.S.2d 79 (1981) 11
Highway Truck Drivers & Helpers v. *Cohen*, 334 F.2d 378 (3d Cir.), cert. denied, 379 U.S. 921 (1964) 22
Local No. 92, Int'l Ass'n of Bridge Workers v. *Norris*, 383 F.2d 735 (5th Cir. 1967) 22
Mackey v. *Lanier Collection Agency & Service, Inc.*, 108 S. Ct. 2182 (1988) 7-8, 12
Morrissey v. *Curran*, 650 F.2d 1267 (2d Cir. 1981) 21
Morton v. *Mancari*, 417 U.S. 535 (1974) 24
NLRB v. *Amax Coal Co.*, 453 U.S. 322 (1981) 16, 25
Radzanower v. *Touche Ross & Co.*, 426 U.S. 148 (1976) .. 24
St. Paul Fire & Marine Ins. Co. v. *Cox*, 752 F.2d 550 (11th Cir. 1985) 5, 13
Samples v. *Samples*, 414 F. Supp. 773 (W.D. Okla. (1976) 26
Shaw v. *Delta Air Lines, Inc.*, 463 U.S. 85 (1983) 20-21
Tenneco, Inc. v. *First Virginia Bank*, 698 F.2d 688 (4th Cir. 1983) 11, 14
United Metal Products Corp. v. *National Bank*, 811 F.2d 297 (6th Cir. 1987), cert. dismissed, 108 S. Ct. 1494 (1988) 6, 13, 14, 19
United Mine Workers of America v. *Boyle*, 567 F.2d 112 (D.C. Cir. 1977), cert. denied, 435 U.S. 956 (1978) 23
Villano v. *Villano*, 98 Misc. 2d 774, 414 N.Y.S.2d 625 (Sup. Ct. 1979) 26
Vink v. *SHV N. Am. Holding Corp.*, 549 F. Supp. 268 (S.D.N.Y. 1982) 5, 15, 17, 19

Cases – Continued: Page

Ward v. *Ward*, 146 N.J. Super. 354, 396 A.2d 365 (1978) 26
Winer v. *Edison Bros. Stores Pension Plan*, 593 F.2d 307 (8th Cir. 1979) 4-5, 15

Statutes and regulations:

Consumer Credit Protection Act, 15 U.S.C. 1671 *et seq.* .. 1, 7
15 U.S.C. 1671-1677 25
15 U.S.C. 1672(a) 7, 12, 25
15 U.S.C. 1672(c) 7, 12, 25
15 U.S.C. 1673(a) 26, 27
15 U.S.C. 1673(a)(1) 25
15 U.S.C. 1673(b) 25
15 U.S.C. 1673(c) 10, 26, 27
15 U.S.C. 1676 ..... 2, 27
15 U.S.C. 1677(1) 26
Employee Retirement Income Security Act of 1974:
18 U.S.C. 664 18
26 U.S.C. 401(a)(13)(A) (1982 & Supp. V 1987) 5
26 U.S.C. 401(a)(13)(B) (Supp. V 1987) 13-14
26 U.S.C. 411(a) (1982 & Supp. V 1987) 4
§§ 2 *et seq.*, 29 U.S.C. 1001 *et seq.* 1
§ 2(a), 29 U.S.C. 1001(a) 14, 16
§ 3(14)(C), 29 U.S.C. 1002(14)(C) 16
§ 3(14)(D), 29 U.S.C. 1002(14)(D) 16
§ 203(a), 29 U.S.C. 1053(a) (1982 & Supp. V 1987) .. 4, 15
§ 206(d)(1), 29 U.S.C. 1056(d)(1) 1, 5, 8, 10, 12
§ 206(d)(2), 29 U.S.C. 1056(d)(2) 8, 10
§ 206(d)(3), 29 U.S.C. 1056(d)(3) (Supp. V 1987) .. 8, 11, 13
§ 403(c)(1), 29 U.S.C. 1103(c)(1) 9, 16
§ 404, 29 U.S.C. 1104 18
§ 404(a)(1)(A), 29 U.S.C. 1104(a)(1)(A) 8, 14
§ 406, 29 U.S.C. 1106 ..... 16, 18
§ 409, 29 U.S.C. 1109 20
§ 409(a), 29 U.S.C. 1109(a) 9, 17
§ 502, 29 U.S.C. 1132 (1982 & Supp. V 1987) 11, 18
§ 502(a), 29 U.S.C. 1132(a) 2, 18

Statutes and regulations—Continued: Page

§ 502(a)(1)(B), 29 U.S.C. 1132(a)(1)(B) 3
§ 502(a)(2), 29 U.S.C. 1132(a)(2) 20
§ 502(b), 29 U.S.C. 1132(b) 2
§ 514(b)(7), 29 U.S.C. 1144(b)(7) (Supp. V 1987) 13
§ 514(d), 29 U.S.C. 1144(d) 20, 22

Internal Revenue Code:
26 U.S.C. 6334(a) (1982 & Supp. V 1987) 22
26 U.S.C. 6334(a)(6) 22, 23
26 U.S.C. 634(c) (1982 & Supp. V 1987) 22

Labor-Management Relations Act of 1947, Tit. II, 29 U.S.C. 171 *et seq.* 5

Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 401 *et seq.* 1
29 U.S.C. 401(b) 21
29 U.S.C. 440 2
29 U.S.C. 464 2
29 U.S.C. 482 2
29 U.S.C. 501 ..... 22, 23
29 U.S.C. 501(a) 4, 21
29 U.S.C. 501(b) 9, 21
29 U.S.C. 501(c) 2, 3, 19, 21
29 U.S.C. 521 2
29 U.S.C. 523(a) 24, 26

Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426:
§ 104(a), 98 Stat. 1433 (29 U.S.C. 1056(d)(3) (Supp. V 1987)) 13
§ 104(b), 98 Stat. 1436 (29 U.S.C. 1144(b)(7) (Supp. V 1987)) 13
§ 204(a), 98 Stat. 1445 (26 U.S.C. 401(a)(13)(B) (Supp. V 1987)) 13-14

Reorg. Plan No. 4 of 1978, 3 C.F.R. 332 (1979) 11

26 C.F.R.:
Section 1.401(a)-13 2
Section 1.401(a)-13(b)(1) 8, 11
Section 1.401(a)-13(b)(2) 22
Section 1.401(a)-13(c)(1)(i) 16

29 C.F.R. 870.51(c) 2, 10, 27

Miscellaneous: Page

G. Bogert, *Trusts and Trustees* (2d ed. 1979) 18
120 Cong. Rec. 29,197 (1974) 15
130 Cong. Rec. 23,481 (1984) 14
43 Fed. Reg. 6942 (1978) 22
H.R. 4473, 86th Cong., 1st Sess. (1959) 22
H.R. Conf. No. Rep. 1280, 93d Cong., 2d Sess. (1974) ... 10, 15
H.R. Rep. No. 533, 93d Cong., 1st Sess. (1973) 16
H.R. Rep. No. 807, 93d Cong., 2d Sess. (1974) 10, 15
H.R. Rep. No. 655, 98th Cong., 2d Sess. Pt. 1 (1984) 14
1 NLRB, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959* (1959) 22
S. 1137, 86th Cong., 1st Sess. (1959) 22
S. Rep. No. 127, 93d Cong., 1st Sess. (1973) 24
S. Rep. No. 575, 98th Cong., 2d Sess. (1984) 14
Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess., *Legislative History of the Employee Retirement Income Security Act of 1974* (Comm. Print 1976):
Vol. 1 24
Vol. 2 ..... 10, 15, 16
Vol. 3 ..... 10, 15

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1105

CURTIS GUIDRY, PETITIONER

v.

SHEET METAL WORKERS NATIONAL PENSION FUND, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

Petitioner embezzled funds from his union while he was its chief executive officer, and the union seeks to garnish his pension accounts to recover its losses. This case therefore concerns the relationships among three federal statutes: the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*; the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. 401 *et seq.*; and the Consumer Credit Protection Act (CCPA), 15 U.S.C. 1671 *et seq.* ERISA's prohibition on assignment or alienation of pension benefits, 29 U.S.C. 1056(d)(1), is at the heart of the case. The Secretary of the Treasury, the official vested with rulemaking and interpretive authority regarding the anti-alienation provision, has promulgated a regulation

(26 C.F.R. 1.401(a)-13) interpreting that provision to preclude garnishment of petitioner's pension accounts under the facts of this case. Since the decision below is inconsistent with that regulation, the Secretary of the Treasury has a substantial interest in this case. The Secretary of Labor also has an interest because the interpretation of ERISA's anti-alienation provision implicates basic ERISA policies that may affect the Secretary's enforcement of the Act. 29 U.S.C. 1132(a) and (b).

The Secretary of Labor also has significant responsibilities for enforcing the LMRDA; she conducts investigations (29 U.S.C. 521) and oversees litigation involving the reporting and disclosure requirements (29 U.S.C. 440), trusteeships (29 U.S.C. 464), union elections (29 U.S.C. 482), and criminal actions for violation of the statute's embezzlement provisions (29 U.S.C. 501(c)). Indeed, in this case, the Secretary investigated petitioner's embezzlement of union funds. In addition, the Secretary of Labor enforces the CCPA's restrictions on garnishment (15 U.S.C. 1676), and the decision below is inconsistent with a Labor Department regulation (29 C.F.R. 870.51(c)) interpreting those restrictions.

In deciding this case, the court of appeals apparently did not consider either set of applicable regulations cited above. The United States has an interest in seeing that pertinent agency regulations are duly considered and properly applied by the courts. The government also has an interest in seeing that these three labor statutes are construed together to give the greatest possible effect to the protective purposes underlying each. The United States previously filed a brief in this case at the Court's invitation urging that the petition for a writ of certiorari be granted.

STATEMENT

1. Petitioner Curtis Guidry was formerly employed as the chief executive officer, business manager, and financial secretary-treasurer of respondent Sheet Metal Workers International Association, Local No. 9 (the Union). He also served as a trustee of the Union's local pension and welfare plans. In 1982, petitioner pleaded guilty to violating the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. 501(c), by embezzling over $377,000 from the Union. As the Union's chief financial officer, petitioner was able to use several methods to embezzle from the Union. For example, he transferred money from the Union's checking account to his own account and made unauthorized cash withdrawals from the Union's savings account for his personal use. In addition, he deposited into his personal account checks payable to the Union, including checks received by the Union from the pension and welfare plans for administrative services. Petitioner was charged with, and convicted of, embezzling from the Union only. There was no allegation that he had stolen from the pension or welfare plans. Pet. App. A2-A3, B2, C8-C10; U.S. App. 1a-2a.[1]

After serving a prison term and resigning from his employment with the Union, petitioner applied for early retirement benefits from the three respondent pension plans. When two of the plans refused to pay, he brought this action against those two plans under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1132(a)(1)(B), to enforce his right to accrued and future pension benefits. While not disputing that petitioner

[1] "U.S. App." refers to the appendix to the brief previously submitted by the federal government in this case in response to the Court's invitation to the Solicitor General to express the views of the United States.

was otherwise entitled to benefits, the plans contended that he had forfeited his eligibility by his misconduct. The Union intervened, joined the third pension plan as a party, and asserted six claims against petitioner. The first claim alleged breaches of petitioner's fiduciary duties to the Union in violation of Section 501(a) of the LMRDA, 29 U.S.C. 501(a), while the second through fifth claims essentially restated the first claim under various state common law theories. The sixth claim asked the court to impose a constructive trust on petitioner's pension benefits in favor of the Union, and to enjoin the plans from paying any further benefits to petitioner until the Union was made whole for its losses. Petitioner and the Union stipulated to the entry of a $275,000 judgment on the Union's first five claims, while agreeing to litigate the availability of the constructive trust remedy. The plans that had denied benefits continued to argue that petitioner had totally forfeited his right to those benefits, but asserted in the alternative that, if pension benefits were owed, the Union should receive them. Pet. App. A3, B2; U.S. App. 3a-9a.

2. The district court held that petitioner had not forfeited his pension benefits. It relied on several cases interpreting ERISA's anti-forfeiture provision (§ 203(a), 29 U.S.C. 1053(a) (1982 & Supp. V 1987))[2] to preclude forfeiture of pension benefits because of employee misconduct, even where that misconduct amounted to criminal fraud against the employer.[3] However, the court

[2] Section 203(a) states that "[e]ach pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age." It further provides that an employee's own contributions to a plan are at all times nonforfeitable and that employers' contributions must become nonforfeitable according to a vesting schedule set out in the statute. See also 26 U.S.C. 411(a) (1982 & Supp. V 1987).

[3] Pet. App. B3, citing *Fremont* v. *McGraw-Edison Co.*, 606 F.2d 752 (7th Cir. 1979), cert. denied, 445 U.S. 951 (1980); *Winer* v. *Edison Bros. Stores Pension Plan*, 593 F.2d 307 (8th Cir. 1979); *Vink* v. *SHV N. Am. Holding Corp.*, 549 F. Supp. 268 (S.D. N.Y. 1982).

imposed a constructive trust on petitioner's pension benefits, making them payable to the Union. Pet. App. B5. It held that ERISA does not bar imposition of such a constructive trust, despite what the court described (*id.* at B3) as the "unconditional" language of the statute's anti-alienation provision. § 206(d)(1), 29 U.S.C. 1056(d)(1).[4] The court observed that Congress had recently enacted an exception to the anti-alienation provision for "qualified domestic relations order[s]" after courts "had found an implied exception" for that purpose in cases such as *AT&T* v. *Merry*, 592 F.2d 118 (2d Cir. 1979). Pet. App. B3-B4.

The district court also noted that two circuits had reached contrary conclusions on the question whether to infer an exception to the anti-alienation provision in cases involving criminal misconduct or fraud. Pet. App. B4, citing *Ellis National Bank* v. *Irving Trust Co.*, 786 F.2d 466 (2d Cir. 1986) (no exception), and *St. Paul Fire & Marine Ins. Co.* v. *Cox*, 752 F.2d 550 (11th Cir. 1985) (exception implied). However, the court did not consider this case to be entirely comparable to either *Ellis National Bank* or *St. Paul Fire & Marine* because, unlike those cases, here the "question is not whether particular state law is preempted by ERISA," but instead is "how to interpret the nonalienability provision's effect on other federal statutes." Pet. App. B4. In particular, the court believed that ERISA should be read "in pari materia" with the Labor-Management Relations Act of 1947, Tit. II, 29 U.S.C. 171 *et seq.*, and the LMRDA, whose purposes are to protect workers against "corrupt practices on the part

[4] Section 206(d)(1) states that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." See also 26 U.S.C. 401(a)(13)(A) (1982 & Supp. V 1987).

of union officers." Pet. App. B4. Considering the protective purposes of all three statutes, the court concluded that "[i]n circumstances where the viability of a union and the members' pension plans was damaged by the knavery of a union official, a narrow exception to ERISA's anti-alienation provision is appropriate." *Id.* at B5. Therefore, the court granted the constructive trust remedy sought by the Union. *Ibid.*[5]

3. The court of appeals affirmed, concluding that the district court properly used its "inherent equitable authority" to impose a constructive trust "to redress breaches of ERISA" and to recover "money embezzled by [petitioner] from the pension fund." Pet. App. A2, A4, A5. In the court's view, ERISA's anti-alienation provision is subject to an implied exception for fraud, an exception the court defined as a "narrow" one "applicable only to a trustee-beneficiary [of a pension fund] who has directly or indirectly damaged the fund through his fraudulent actions." *Id.* at A12 n.3. The court relied largely on decisions of the District of Columbia and Eleventh Circuits in *Crawford* v. *La Boucherie Bernard Ltd.*, 815 F.2d 117 (D.C. Cir.), cert. denied, 108 S. Ct. 328 (1987), and *St. Paul Fire & Marine,* which it described as authorizing a court to "garnish a beneficial interest in a plan to satisfy a judgment based on a breach of ERISA." Pet. App. A4. It declined to follow the holdings of the Sixth and Second Circuits in *United Metal Products Corp.* v. *National Bank*, 811 F.2d 297 (6th Cir. 1987), cert. dismissed, 108 S. Ct. 1494 (1988), and *Ellis National Bank*, which refused to imply a criminal misconduct exception to ERISA's anti-alienation provision. Pet. App. A5.

[5] Although no mention of the issue was made in the court's opinion, the hearing transcript shows the court's belief that, by imposing a constructive trust rather than a "garnishment," it could avoid any exemption issues that might arise under the Consumer Credit Protection Act. Pet. App. C22.

Emphasizing both the importance of fiduciary responsibility and the broad scope of the remedies provided in ERISA's enforcement provisions, the court of appeals found "no indication in [ERISA] that the unscrupulous fiduciary is to be protected from the natural legal consequences of his or her misdeeds." Pet. App. A5. According to the court, "[w]hen [petitioner] left office after embezzling at least $370,000, the Union had only $150,000 in cash assets remaining, and the financial security of workers who relied upon the Union's pension plan was severely undermined." *Ibid.* Under these circumstances, the court concluded that imposing a constructive trust on petitioner's pension benefits "both accorded with [established] principles of trust law and was well within its discretionary power as defined by the common law and ERISA." *Id.* at A7.[6]

Finally, the court of appeals rejected petitioner's effort to exempt 75 percent of his pension benefits from garnishment under the Consumer Credit Protection Act, 15 U.S.C. 1671 *et seq.* (CCPA). The court recognized that the CCPA's definitions of "earnings" and "garnishment" (15 U.S.C. 1672(a) and (c), respectively) encompass periodic pension payments subjected to a constructive trust.[7] However, it declined to reach the issue on the ground that petitioner had not filed a timely objection to the writ of garnishment as required by governing state law. Pet. App. A10-A11. The court cited *Mackey* v. *Lanier Collection*

[6] The court also rejected petitioner's argument that a constructive trust could be imposed only on embezzled funds that could be traced back into the pension plan. Pet. App. A7-A9. That issue was not presented in the petition for a writ of certiorari.

[7] Section 1672(a) defines "earnings" to include "periodic payments pursuant to a pension or retirement program." Section 1672(c) defines "garnishment" as "any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt."

Agency & Service, Inc., 108 S. Ct. 2182 (1988), for the proposition that state garnishment laws are not preempted by ERISA, but did not address the question whether such laws might be preempted by the CCPA. Pet. App. A13 n.7.

SUMMARY OF ARGUMENT

I. ERISA's anti-alienation provision states that pension benefits "may not be assigned or alienated." § 206(d)(1), 29 U.S.C. 1056(d)(1). The statute provides only two exceptions: one for voluntary and revocable assignments of ten percent or less of a benefit payment and the other for involuntary assignments to enforce "qualified domestic relations order[s]." § 206(d)(2) and (3), 29 U.S.C. 1056(d)(2) and (3) (1982 & Supp. V 1987). In line with the language of the statute, the applicable regulation prohibits any other "attachment, garnishment, levy, execution or other legal or equitable process." 26 C.F.R. 1.401(a)-13(b)(1). Thus, unless an additional exception is to be inferred, the courts below erred by ordering the pension plans to pay petitioner's benefits to his former employer.

No criminal misconduct exception should be inferred to allow employers to recoup losses by tapping an employee's pension account. First, the statute and interpretive regulations do not provide for such an exception. Second, other provisions in ERISA reinforce the conclusion that, despite its equitable appeal, such an exception would be contrary to Congress's intention to ensure that employees (and their families, who are not normally responsible for employee misconduct) actually receive the pension benefits they have been promised. Specifically, the statute provides that pension plan assets must be used only to provide benefits and to pay reasonable administrative costs (§ 404(a)(1)(A), 29 U.S.C. 1104(a)(1)(A)), and further provides that pension benefits must vest according to a schedule set out in the statute and that vested benefits are not forfeitable

(§ 203(a), 29 U.S.C. 1053(a)). Third, the statute also states that pension plan assets "shall never inure to the benefit of any employer." § 403(c)(1), 29 U.S.C. 1103(c)(1). Thus, Congress has made especially clear that employers may not invade their employees' pension accounts.

Nor is recovery by petitioner's former employer warranted, under the facts of this case, on the ground that a fiduciary has breached his duties to a pension plan in violation of Section 409(a) of ERISA, 29 U.S.C. 1109(a). Whatever the merits of such an exception, it would not apply here because petitioner did not embezzle from the pension plans, but instead stole from his employer. That is made plain by the fact that the constructive trust has been imposed for the benefit of the Union, not the pension plans.

Finally, the remedial provision of the Labor-Management Reporting and Disclosure Act should not be construed to override ERISA's anti-alienation clause. It is true that the LMRDA's authorization of "other appropriate relief" (29 U.S.C. 501(b)) for a union officer's breach of duty might be construed to allow garnishment of the officer's pension account and that such a remedy would further the LMRDA's purpose of protecting union members from malfeasance by union officials. However, the LMRDA does not explicitly authorize invasions of employees' pension accounts, and no court has interpreted the LMRDA to provide for such a remedy. It is therefore appropriate that the subsequently enacted, specific anti-alienation provision of ERISA should take precedence over the more general authorization of "other" relief in the LMRDA.

II. If this Court reverses the court below on the first question presented, it need not reach the second question, which is whether petitioner waived his right under the Consumer Credit Protection Act to shield 75 percent of his periodic pension benefits from garnishment. If the second

question is reached, the Court should reverse the holding of the court of appeals. The CCPA's garnishment restriction is phrased as a limitation on the power of the courts: the statute provides that no court "may make, execute, or enforce any order or process in violation of this section." 15 U.S.C. 1673(c). Accordingly, as the Department of Labor has concluded in the applicable interpretive regulation (29 C.F.R. 870.51(c)), the restriction is not subject to waiver. Rather, it is self-executing.

ARGUMENT

I. ERISA'S ANTI-ALIENATION PROVISION BARS IMPOSITION OF A CONSTRUCTIVE TRUST ON THE PENSION BENEFITS OF A FORMER UNION OFFICER WHO EMBEZZLED UNION FUNDS

A. ERISA's Anti-Alienation Provision Prohibits Garnishment of Pension Benefits

Under ERISA's anti-alienation provision, "Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated." § 206(d)(1), 29 U.S.C. 1056(d)(1). This provision was intended to "ensure that the employee's accrued benefits are actually available for retirement purposes." H.R. Rep. No. 807, 93d Cong., 2d Sess. 68 (1974), *reprinted in* 2 Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess., *Legislative History of the Employee Retirement Income Security Act of 1974*, at 3188 (Comm. Print 1976) [hereafter "*Leg. Hist.*"]. The statute permits "any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment." § 206(d)(2), 29 U.S.C. 1056(d)(2). The legislative history confirms the unsurprising conclusion that garnishments are to be viewed as involuntary assignments, and thus do not come within that limited exception.[8] The

[8] The Conference Report notes that, "[f]or purposes of this rule, a garnishment or levy is not to be considered a voluntary assignment." H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 280 (1974), *reprinted in* 3 *Leg. Hist.* 4547.

statute authorizes involuntary assignments only to enforce "qualified domestic relations order[s]," *i.e.*, orders relating to such matters as child support and alimony payments. § 206(d)(3), 29 U.S.C. 1056(d)(3) (Supp. V 1987).

Consistent with the statutory language and the legislative history, a regulation promulgated by the Treasury Department in 1978 interprets the anti-alienation provision to prohibit involuntary alienation, including garnishment, for other purposes.[9] The regulation states that "benefits provided under [a qualified] plan may not be anticipated, assigned (either at law or in equity), alienated or subject to attachment, garnishment, levy, execution or other legal or equitable process." 26 C.F.R. 1.401(a)-13(b)(1). The overwhelming majority of courts have agreed that ERISA precludes garnishment of pension benefits by general creditors of plan participants.[10] Those courts have reasoned that the anti-alienation provision insulates pension plan benefits from garnishment in order to

[9] All rulemaking and interpretive authority with respect to ERISA's minimum funding, participation, and vesting standards for employee benefit plans is consolidated in the Secretary of the Treasury (in practice, the Internal Revenue Service (IRS)). Reorg. Plan No. 4 of 1978, § 101(a), 3 C.F.R. 332 (1979). The Secretary of Labor, however, retains authority under Section 502 of ERISA, 29 U.S.C. 1132 (1982 & Supp. V 1987), to bring civil actions to enforce fiduciary obligations under such plans consistent with the IRS's interpretation of those standards. Reorg. Plan No. 4 of 1978, § 104, 3 C.F.R. 333 (1979). Thus, both agencies have responsibility for enforcement of the anti-alienation provision.

[10] See, *e.g.*, *Tenneco, Inc.* v. *First Virginia Bank*, 698 F.2d 688, 689-690 (4th Cir. 1983); *General Motors Corp.* v. *Buha*, 623 F.2d 455, 460-463 (6th Cir. 1980); *Commercial Mortgage Ins., Inc.* v. *Citizens National Bank*, 526 F. Supp. 510, 516-520 (N.D. Tex. 1981); *Christ Hospital* v. *Greenwald*, 82 Ill. App. 3d 1024, 1027-1028, 403 N.E.2d 700, 703-704 (1980); *Helmsley-Spear, Inc.* v. *Winter*, 74 A.D.2d 195, 199, 426 N.Y.S.2d 778, 781 (1980), aff'd, 52 N.Y.2d 984, 419 N.E.2d 1078, 438 N.Y.S.2d 79 (1981).

ensure that plan participants and their dependents actually receive their pension benefits.[11]

In *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 108 S. Ct. 2182 (1988), holding that welfare benefits (such as vacation benefits) are subject to garnishment, the Court contrasted ERISA's treatment of welfare benefits with its treatment of pension benefits. The Court reasoned that Section 206(d)(1) showed that Congress knew how to prevent garnishment of employee benefit plans and that it had chosen to prohibit garnishment of pension benefits only. 108 S. Ct. at 2188-2189. Thus, this Court read the anti-alienation provision as barring garnishment of pension accounts.

The constructive trust remedy imposed by the district court is essentially a garnishment. Under the Consumer Credit Protection Act, which defines "earnings" to include pension benefits (15 U.S.C. 1672(a)), "garnishment" is defined as "any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt" (15 U.S.C. 1672(c)). There is no reason to apply any narrower definition under ERISA. Accordingly, the court's order directing the pension plans to pay petitioner's pension benefits to his former employer is contrary to the anti-alienation provi-

[11] The court below recently held that the Federal Deposit Insurance Corporation (FDIC), acting as the receiver of a failed bank, was in no better position than any other commercial creditor to garnish a debtor's pension account. *FDIC* v. *Farha*, No. 87-1530 (10th Cir. June 13, 1989). In concluding that ERISA's anti-alienation provision precludes such a garnishment, the Tenth Circuit specifically deferred (slip op. 6-7) to the Treasury regulation, which it failed to mention in the present case. In distinguishing its decision here, the court reiterated its view that this case involved embezzlement of pension plan funds. *Id.* at 8 n.2. That belief is erroneous. See pp 17-20, *infra*.

sion, which is aimed at protecting pension benefits from seizure by persons other than participants and beneficiaries. No applicable exception authorizes such payment.

B. This Court Should Not Infer a General Criminal Misconduct Exception to ERISA's Anti-Alienation Clause for the Benefit of Employers –

In *St. Paul Fire & Marine Ins. Co.* v. *Cox*, 752 F.2d 550 (1985), the Eleventh Circuit recognized that the anti-alienation provision prohibits general creditors from garnishing pension accounts. 752 F.2d at 551. However, relying on the "equitable principle that a wrongdoer should not benefit from his misdeeds," the court held that "garnishment undertaken to satisfy liabilities arising from criminal misconduct toward an employer constitutes an exception to the non-alienability provisions of ERISA." *Id.* at 552. Both the Second Circuit in *Ellis National Bank* v. *Irving Trust Co.*, 786 F.2d 466, 471 (1986), and the Sixth Circuit in *United Metal Products Corp.* v. *National Bank*, 811 F.2d 297, 299-300 (1987), cert. dismissed, 108 S. Ct. 1494 (1988), have expressly rejected the Eleventh Circuit's approach.

In our view, the Second and Sixth Circuits correctly refused to infer a criminal misconduct exception. As an initial matter, "whether an exception should be created is a question for legislative rather than judicial judgment" (*United Metal Products*, 811 F.2d at 300; accord *Ellis National Bank*, 786 F.2d at 472), and Congress has created no such exception. Since it enacted ERISA in 1974, Congress has added only one exception to ERISA's anti-alienation provision, the limited exception for "qualified domestic relations order[s]" contained in the Retirement Equity Act of 1984, Pub. L. No. 98-397, §§ 104(a), 104(b), 204(a), 98 Stat. 1433, 1436, 1445 (codified at 29 U.S.C. 1056(d)(3), 1144(b)(7) (Supp. V 1987), 26 U.S.C.

401(a)(13)(B) (Supp. V 1987)).[12] In "carving out an appropriate and well-defined exception for domestic relations orders meeting specific standards" (130 Cong. Rec. 23,481 (1984) (remarks of Rep. Erlenborn)), Congress reaffirmed its intent to make no other changes in the anti-alienation or preemption provisions of ERISA. *Ibid.*; see also H.R. Rep. No. 655, 98th Cong., 2d Sess. Pt. 1, at 39, 42 (1984).

Moreover, "[d]espite its equitable appeal, [a] 'criminal misconduct' exception * * * undermines a fundamental purpose of ERISA * * * that 'if a worker has been promised a defined pension benefit upon retirement * * * he actually receives it.' " *Ellis National Bank*, 786 F.2d at 471, quoting *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981); accord *United Metal Products*, 811 F.2d at 300. That objective is codified in the statutory provision requiring that plan assets be held "for the exclusive purposes of * * * providing benefits to participants in the plan and their beneficiaries * * * and defraying reasonable expenses of administering the plan." 29 U.S.C. 1104(a)(1)(A).

[12] That amendment was in response to a series of cases in which the courts had recognized an implied exception to the anti-alienation provision to permit garnishment of pension benefits to satisfy spousal and child support and community property obligations contained in the orders of state domestic relations courts. S. Rep. No. 575, 98th Cong., 2d Sess. 18-19 (1984). The exception was grounded in ERISA's stated purpose "to provide protection for employees *and their families.*" *Tenneco, Inc.*, 698 F.2d at 690 (emphasis added); see 29 U.S.C. 1001(a) ("Congress finds * * * that the continued well-being and security of millions of employees *and their dependents* are directly affected by these plans") (emphasis added). Employers and other creditors, of course, cannot claim the same equitable interest in pension benefits as a participant's spouse and children. Nor, unlike family members, are they part of the class ERISA expressly was designed to protect. See, *e.g.*, *Ellis National Bank*, 786 F.2d at 470-471 and cases discussed therein.

In addition, to ensure that employees actually receive the pension benefits they were promised, ERISA includes detailed provisions for vesting and nonforfeitability of pension rights, "concepts * * * critical to the ERISA scheme." *Alessi*, 451 U.S. at 510. For example, Section 203(a), 29 U.S.C. 1053(a) (1982 & Supp. V 1987), the anti-forfeiture provision, directs each pension plan to "provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age" and requires pre-retirement vesting of accrued benefits according to a prescribed schedule. Except as specifically provided by the statute itself, "an employee's rights, once vested, are not to be forfeitable for any reason." H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 271 (1974); *reprinted in* 3 *Leg. Hist.* 4538. This general prohibition against forfeiture of vested pension benefits was aimed directly at outlawing so-called "bad boy" clauses that denied benefits "because the employee later went to work for a competitor, or in some other way was considered 'disloyal' to the employer." H.R. Rep. No. 807, 93d Cong., 2d Sess. 60 (1974), *reprinted in* 2 *Leg. Hist.* 3180; see also 120 Cong. Rec. 29,197 (1974) (remarks of Rep. Dent), *reprinted in* 3 *Leg. Hist.* 4669. The drafters therefore intended to prevent the cancellation of retirement benefits as a method of punishing employees for real or imagined offenses, including theft or fraud. See *Fremont* v. *McGraw-Edison Co.*, 606 F.2d 752 (7th Cir. 1979), cert. denied, 445 U.S. 951 (1980); *Winer* v. *Edison Bros. Stores Pension Plan*, 593 F.2d 307 (8th Cir. 1979); *Vink* v. *SHV N. Am. Holding Corp.*, 549 F. Supp. 268 (S.D. N.Y. 1982).[13]

[13] Relying on this authority, the district court below properly rejected the plans' argument that petitioner had forfeited his pension benefits by his criminal misconduct. Pet. App. B3.

ERISA further safeguards pension benefits by directing that "the assets of a plan shall never inure to the benefit of any employer." 29 U.S.C. 1103(c)(1). The regulations accordingly define a prohibited "assignment" or "alienation" to include "[*a*]*ny* arrangement providing for the payment *to the employer* of plan benefits which otherwise would be due the participant under the plan." 26 C.F.R. 1.401(a)-(13)(c)(1)(i) (emphasis added). To prevent employers from profiting from the assets of employee benefit plans, the statute also imposes strict fiduciary duties on plan trustees and prohibits entire categories of financial transactions between plans and parties in interest, defined to include both employers and unions. 29 U.S.C. 1002(14)(C) and (D), 1106. As this Court has emphasized, the purpose of these ERISA provisions is "specifically [to] insulate the trust from the employer's interest." *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 333 (1981). Thus, nothing in the language or legislative history of ERISA places an employer harmed by an employee's embezzlement in a better position than that of any other third-party creditor attempting to collect a debt by garnishing a pension plan account. To the contrary, an implied exception in favor of *employers* would also be directly contrary to provisions in ERISA other than the anti-alienation provision.

Barring the diversion of pension benefits to accomplish other societal goals is fully consistent with the language of the statute and with congressional intent. ERISA was enacted primarily for "the protection of individual pension rights." H.R. Rep. No. 533, 93d Cong., 1st Sess. 1 (1973), *reprinted in* 2 *Leg. Hist.* 2348. Indeed, Congress's considered judgment was that the economic security of retirees—and their dependents—was paramount, even against other worthy objectives. The whole point of a provision barring involuntary alienation is to prevent third

parties with legitimate claims against a person's property from collecting out of the pension assets protected by the provision. Consequently, contrary to the court's belief (Pet. App. A5), Congress *did* intend the anti-alienation provision "to protect[] individuals such as [petitioner] from the consequences of their misconduct."[14] See *Crausman* v. *Curtis-Wright Corp.*, 676 F. Supp. 1302, 1304 (D.N.J. 1988) ("Congress did not intend to include or permit an employee misconduct exception"). The message of ERISA's anti-alienation provision, which is also reflected in other provisions of the statute, is that creditors generally, and particularly a creditor who was a participant's employer, cannot invade a debtor's promised pension benefits.[15]

C. The Facts of This Case Do Not Warrant Recovery on the Ground That a Fiduciary Has Breached His Duty to a Pension Plan

In *Crawford* v. *Le Boucherie Bernard Ltd.*, 815 F.2d 117, cert. denied, 108 S. Ct. 328 (1987), the District of Columbia Circuit held that, where the fiduciary of an employee benefit plan embezzled from the plan itself, the plan can recoup its losses from the fiduciary's pension account. The court found authority for that offset remedy in Section 409(a) of the Act, 29 U.S.C. 1109(a), which provides that fiduciaries "shall be personally liable to make

---

[14] Congress also intended to protect employees' dependents, who ordinarily bear no responsibility for the employee's misconduct. See 29 U.S.C. 1001(a); *Vink*, 549 F. Supp. at 271.

[15] For purposes of the anti-alienation provision of ERISA, it is immaterial that a *union* happened to be petitioner's employer as well as a sponsor of and contributor to the pension plan. The further contention—that since this case involves theft from a union by a union officer, the case is governed by the Labor-Management Reporting and Disclosure Act—is considered in Point I(D), below.

good to such plan any losses to the plan resulting from each such breach." The court also noted that Section 502(a), 29 U.S.C. 1132(a), authorizes "appropriate equitable relief" in cases involving breaches of fiduciary duties, and that, under the law of trusts, a breaching fiduciary's share of trust property " 'will be taken by the court in order to make good the loss.' " 815 F.2d at 120 (quoting G. Bogert, *Trusts and Trustees* § 191, at 484 (2d ed. 1979)).

The court below apparently believed that this case is comparable to *Crawford*. It repeatedly mischaracterized petitioner's misconduct as involving embezzlement "from the pension fund" (see, *e.g.*, Pet. App. A2) and described the use of a constructive trust as "redress[ing] breaches of ERISA" (*id.* at A5; see also *id.* at A6, A7, A9, A11 n.3, A13 n.7). In fact, petitioner was neither prosecuted for embezzlement from an ERISA-covered pension plan (see 18 U.S.C. 664) nor subjected to a civil suit under ERISA in his capacity as a plan trustee for any breaches of his ERISA fiduciary duties (see 29 U.S.C. 1104, 1106, 1132 (1982 & Supp. V 1987)). Indeed, none of the plans involved in this litigation suffered any actual losses as a result of petitioner's actions.[16] Instead, petitioner was prosecuted for—and pleaded guilty to—a criminal violation of the Labor-Management Reporting and Disclosure Act for embezzlement from the Union. 29 U.S.C. 501(c); Pet. App. B2; U.S. App. 1a-2a. Moreover, the Union obtained the civil judgment debt that it seeks to enforce through the constructive trust in an LMRDA action against petitioner for breaching his fiduciary duties as a union officer. Pet. App. B2. And the district court ordered the pension plan trustees to pay petitioner's benefits to the Union, not to the plans themselves. Since petitioner embezzled from the Union, not the plans, the constructive trust was imposed to remedy a violation of the LMRDA, not (as the Tenth Circuit erroneously assumed) a violation of ERISA.[17]

[16] Part of the $377,000 petitioner admitted to embezzling from the Union originated from the employee benefit plans, as payments from the plans to the Union for administrative services. But when petitioner converted this money to his personal use, it had already been paid to the Union and belonged to the Union. The parties agreed that the plans suffered no losses as a result of petitioner's embezzlement. The Union's attorney told the district court that "[w]e are the ones who lost the money" (Pet. App. C13), and the pension plans' attorney agreed with the district court that "the victim here in terms of whose money got taken is the union" (*id.* at C10). Also, even if petitioner *could* have been prosecuted or sued for breaching his duties to the plans, he was not, and this case must be decided on its actual facts.

In short, this case is similar in all its material facts to *United Metal Products, Ellis National Bank,* and *St. Paul Fire & Marine,* where employers sought to garnish former employees' pension plan benefits to recover losses resulting from embezzlement or fraud against the em-

[17] At one point, the court below, apparently recognizing that the pension plan had suffered no direct loss, suggested that the pension plans were injured by petitioner's misconduct because the Union administered the plans and its financial security had been damaged by his embezzlement. Pet. App. A5. This theory is an especially troublesome challenge to the integrity of the anti-alienation provision. The court was surely incorrect in its view (see *id.* at A5, A12 n.3) that a "narrow," "easily defined" exception to the anti-alienation provision could be carved out for fraudulent actions that "directly or indirectly" damage a pension plan. Such an exception could encompass virtually any crime against an employer or union plan sponsor that might have ripple effects on the plan, *e.g.*, by reducing the level of future contributions by the sponsor. As several courts have observed, delineating the scope of such an exception would likely require a "boundless stream of suits and disputes." *Vink*, 549 F. Supp. at 273; see also *United Metal Products*, 811 F.2d at 300; *Ellis National Bank*, 786 F.2d at 471.

ployer.[18] It is not comparable to *Crawford* because petitioner did not embezzle from the pension plans he administered.[19] Since, as we have shown (pp. 13-17, *supra*), a general criminal misconduct exception should not be implied in favor of employers, the facts of this case do not support a constructive trust remedy in favor of the Union.

D. The Remedial Provision of the Labor-Management Reporting and Disclosure Act Does Not Override ERISA's Anti-Alienation Clause

As the district court correctly observed (Pet. App. B4-B5), this case differs from the prior employer garnishment cases in one respect—the judgment debt arose not under state law but under federal law (the Labor-Management Reporting and Disclosure Act). Since ERISA preserves all other laws of the United States (29 U.S.C. 1144(d);[20] see *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85,

[18] The court below mischaracterized *United Metal Products, Ellis National Bank*, and *St. Paul Fire & Marine* as involving instances where a trustee of a pension plan, who was also a plan participant, damaged the pension plan through his fraudulent actions. See Pet. App. A11-A12 n.3. In fact, however, none of those three cases involved ERISA fiduciary misconduct against pension plans. Instead, like this case, each of those cases involved an employee who stole from his or her employer.

[19] The correctness of the holding in *Crawford* need not be decided here since this case does not involve an ERISA breach or remedy. (The Secretary of Labor, a party in *Crawford*, supported the offset remedy there on the ground that ERISA authorizes broad remedies to counter breaches of fiduciary duty by trustees of employee benefit plans. See 29 U.S.C. 1109, 1132(a)(2).)

[20] Section 514(d) of ERISA, 29 U.S.C. 1144(d), provides that "[n]othing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(c) of this title) or any rule or regulation issued under such law."

100-101 (1983)), it is necessary to consider whether, despite the strong policy underlying ERISA's anti-alienation provision, anything in the LMRDA should be construed as authorizing the attachment of an unfaithful union officer's pension benefits. Although this question is not without difficulty, we believe that the fact that the judgment debt arose under the LMRDA should not affect the result.

The LMRDA was designed to establish "high standards of responsibility and ethical conduct" for union officials. 29 U.S.C. 401(b). Accordingly, Section 501(a) of that Act declares that officers of a labor organization "occupy positions of trust in relation to such organization and its members as a group" and therefore have a duty "to hold its money and property solely for the benefit of the organization and its members." 29 U.S.C. 501(a). These fiduciary duties are enforceable through a private right of action by the union or any member thereof "to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization." 29 U.S.C. 501(b). A separate criminal provision forbids embezzlement from a union. 29 U.S.C. 501(c).

Although the district court did not specifically refer to Section 501(b) of the LMRDA as a basis for its imposition of a constructive trust, that section's authorization of "other appropriate relief" is a possible statutory source—indeed the only possible source—for such a remedy in this case. The courts have read Section 501(b) to authorize "a wide array of remedies for fiduciary breaches," including damages, accounting, injunctions, surcharge, and restitution. *Morrissey* v. *Curran*, 650 F.2d 1267, 1281 (2d Cir. 1981).[21] In particular, two courts of

[21] Earlier versions of Section 501(b) specifically listed injunctions and restitution among the available remedies, and there is no indica-

appeals have enjoined unions from making any salary or other payments to culpable union officers until they satisfied their judgment debts to the unions for violating the LMRDA. *Local No. 92, Int'l Ass'n of Bridge Workers* v. *Norris*, 383 F.2d 735 (5th Cir. 1967); *Highway Truck Drivers & Helpers* v. *Cohen*, 334 F.2d 378 (3d Cir.), cert. denied, 379 U.S. 921 (1964). The latter court explained its action as " 'merely an injunction in aid of a judgment creditor to set off claims owed it by the judgment debtor.' " 334 F.2d at 381 (citation omitted).

Yet neither the statutory language, the legislative history, nor any case under Section 501 of the LMRDA of which we are aware specifically authorizes imposing a constructive trust on the pension benefits of a union officer to recover the latter's judgment debt to a union.[22] On the

---

tion that Congress intended to exclude them by substituting the catch-all "other appropriate relief." See H.R. 4473, 86th Cong., 1st Sess. § 201(b) (1959), *reprinted in* 1 NLRB, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, at 218-219 (1959); S. 1137, 86th Cong., 1st Sess. § 403(a) (1959), *reprinted in* 1 NLRB, *supra*, at 308.

[22] This lack of specific statutory authority distinguishes collection of LMRDA judgment debts from collection of federal taxes, which is permitted by the same Treasury regulation that bars most other attachments or alienations of pension benefits. 26 C.F.R. 1.401(a)-13(b)(2). As the Internal Revenue Service explained in promulgating the regulation (43 Fed. Reg. 6942 (1978)), that exception to the general rule prohibiting garnishment of pension plans is based both on ERISA's savings clause for other federal laws, 29 U.S.C. 1144(d), and on language in the Internal Revenue Code that overrides other federal statutes. Specifically, 26 U.S.C. 6334(c) (1982 & Supp. V 1987) provides that "[n]otwithstanding any other law of the United States * * *, no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a)." Section 6334(a), in turn, contains ten exemptions, including an exemption for pension payments to railroad employees and military personnel (§ 6334(a)(6)), but contains no general exemption for pen-

contrary, one pre-ERISA court refused to permit a union to collect a judgment debt under Section 501 of the LMRDA by attaching the pension benefits of the defendant union officers, holding such a remedy barred by the spendthrift (anti-alienation) provision of the pension trust agreement. *United Mine Workers of America* v. *Boyle*, 567 F.2d 112 (D.C. Cir. 1977), cert. denied, 435 U.S. 956 (1978). In reaching that decision, the court emphasized that the pension trust is "an independent entity, not part of the [union]," and expressly rejected the view of the dissenting judge that application of the spendthrift provision would be inconsistent with the public policy stated in Section 501 of the LMRDA. 567 F.2d at 113-114. Thus, in providing remedies under the fiduciary provisions of the LMRDA, the courts of appeals have distinguished offsets between a judgment creditor (the union) and a judgment debtor (the union officer) from third-party garnishments in which a pension plan, an outsider to the LMRDA dispute, is asked to divert payments from their intended beneficiary to the union. The former are permissible; the latter are not. Compare *Local 92* and *Highway Truck Drivers* (offset) with *Boyle* (garnishment). ERISA's anti-alienation provision now mandates that all pension plans have the type of spendthrift clause upheld by the District of Columbia Circuit in *Boyle*, adding a strong congressional endorsement to the need for such protection of pension rights.

We recognize, of course, that permitting a constructive trust in this case would further the general protective purposes of the LMRDA.[23] But it would also undermine the

---

sion funds. It is, therefore, clear that Congress intended pension plan accounts other than those listed in Section 6334(a)(6) to be subject to federal tax levies.

[23] It is significant, however, that the drafters of the LMRDA carefully specified their intent to preserve union members' rights

more specific protective purpose of ERISA's anti-alienation provision. Petitioner's substantive right under that provision is firmly grounded in specific statutory language, while the Union's claim to a constructive trust is grounded at best on general equitable principles implied from the LMRDA's catch-all authorization of "other appropriate relief" in Section 501(b). Reading these provisions together in accordance with sound principles of statutory construction, the specific should control the general, so that petitioner's right to receive his pension benefits is preserved. See *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 153 (1976); *Morton* v. *Mancari*, 417 U.S. 535, 550-551 (1974).

Further tipping the scales in favor of ERISA are the history and timing of that statute. The Congress that enacted ERISA was well aware of the existence (and limitations) of the LMRDA and other federal labor statutes then regulating various aspects of pension and welfare plans. See S. Rep. No. 127, 93d Cong., 1st Sess. 3 (1973), *reprinted in* 1 *Leg. Hist.* 589. Had it wished, Congress could have created exceptions to ERISA's anti-alienation and anti-forfeiture provisions to permit garnishment of pension benefits to satisfy LMRDA judgment debts. However, Congress did not do so, and nothing in ERISA (or its legislative history) suggests that it would approve the judicial gloss added to the anti-alienation provision by the court of appeals. To the contrary, Congress

---

under other federal laws from defeasance by the LMRDA. The LMRDA's savings clause, 29 U.S.C. 523(a), states that "[e]xcept as explicitly provided to the contrary, nothing in this chapter shall * * * take away any right * * * to which members of a labor organization are entitled under * * * other Federal law." Here petitioner was a union member with a right to pension benefits protected by ERISA, another federal law; and, as stated, nothing "explicitly provide[s]" that his pension benefits are subject to attachment by the Union.

specifically intended to insulate pension benefits from interference by *all* employers. *Amax Coal*, 453 U.S. at 333. On balance, then, we believe the better view of the two federal statutes is that ERISA's anti-alienation provision precludes the use of pension benefits to satisfy an LMRDA judgment debt.

II. IF ERISA DOES NOT BAR THE CONSTRUCTIVE TRUST, THE CONSUMER CREDIT PROTECTION ACT PROTECTS 75 PERCENT OF PETITIONER'S MONTHLY PENSION BENEFITS

If this Court concludes, contrary to our submission, that ERISA's anti-alienation clause does not protect petitioner's pension benefits in their entirety, it must decide whether the Consumer Credit Protection Act, 15 U.S.C. 1671-1677, shields 75 percent of his periodic pension benefit payments from garnishment. The court of appeals held that petitioner had waived his right to invoke the CCPA by failing to file a timely objection to the writ of garnishment as required by Colorado law. Pet. App. A10-A11. That holding was in error.

Under the CCPA, the maximum amount of an individual's "earnings" that may be subjected to "garnishment" may not exceed "25 per centum of his disposable earnings for that week." 15 U.S.C. 1673(a)(1).[24] "Earnings" are defined to include "periodic payments pursuant to a pension or retirement program" (15 U.S.C. 1672(a)) and "garnishment" is defined broadly as "any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt" (15 U.S.C. 1672(c)). As recognized by the court below, these definitions by their terms "encompass the constructive

---

[24] The statute excepts from the 25 percent limitation support orders, bankruptcy court orders in Chapter 13 proceedings, and orders to pay taxes. 15 U.S.C. 1673(b).

trust levied in the instant case." Pet. App. A10. See also *Ward* v. *Ward,* 164 N.J. Super. 354, 363, 396 A.2d 365, 370 (1978) (pension benefits are "earnings" under CCPA); *Villano* v. *Villano*, 98 Misc. 2d 774, 783, 414 N.Y.S. 2d 625, 632 (Sup. Ct. 1979) (same); *Samples* v. *Samples,* 414 F. Supp. 773, 774 (W.D. Okla. 1976) (same).

As discussed above (note 23, *supra*), the LMRDA preserves the rights of union members under other federal statutes. 29 U.S.C. 523(a). The CCPA's restriction on garnishment, as part of a more specific and later-enacted federal statute, is properly read as a limitation on the more general remedial provisions of the LMRDA. See pp. 23-24, *supra.* Therefore, even if this Court were to hold that the constructive trust imposed in this case is generally authorized by the LMRDA, it should nevertheless conclude that the terms of the trust improperly exceed the CCPA's limitation of garnishment to 25 percent of petitioner's monthly pension benefits.

The court below refused to apply the CCPA's garnishment restriction because it believed that petitioner had waived his right by failing to comply with state garnishment law. That conclusion is incorrect because the CCPA phrases its restriction on garnishment as a mandatory limitation on the power of the courts. The CCPA provides: "No court of the United States or any State * * * may make, execute, or enforce any order or process in violation of this section." 15 U.S.C. 1673(c).[25] Since the statute prohibits the entry of orders providing for garnishment in excess of 25 percent of a person's earnings, other state and federal courts have held that the percentage

[25] Since the CCPA provides that no federal or state court may enter an order in violation of 15 U.S.C. 1673(a), it plainly preempts state laws allowing garnishment in excess of 25 percent of a person's earnings. The CCPA expressly provides that it does not preempt state laws "providing for more limited garnishments." 15 U.S.C. 1677(1).

limitation in Section 1673(a) is "self-executing," and thus, regardless of state law, need not be timely and personally demanded by the debtor. *Donovan* v. *Hamilton County Municipal Court,* 580 F. Supp. 554, 556-557 (S.D. Ohio 1984); *Dyche* v. *Dyche,* 570 S.W.2d 293, 295 (Mo. 1978). Those courts thus agree with a regulation issued by the Secretary of Labor, the official authorized to enforce the CCPA garnishment provisions (15 U.S.C. 1676), interpreting the statute as "not requiring the raising of the [15 U.S.C. 1673](a) restrictions as affirmative defenses in garnishment proceedings." 29 C.F.R. 870.51(c). See *Donovan* v. *Hamilton County,* 580 F. Supp. at 557 (affording deference to the Department of Labor's regulatory interpretation).

In sum, the decision below directly contravenes Section 1673(c) of the CCPA, as interpreted by the Secretary of Labor and prior court decisions. Apparently the courts and the parties below simply overlooked the plain language of Section 1673(c), as well as the authoritative regulatory and judicial interpretations of its preemptive effect, and thus the court erroneously dismissed petitioner's CCPA claim.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

DAVID L. SHAPIRO
Deputy Solicitor General

CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General

ROBERT P. DAVIS
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

MARY-HELEN MAUTNER
Counsel for Appellate Litigation

ELLEN L. BEARD
Attorney

AUGUST 1989

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—241 699/00381

RESPONDENT'S

BRIEF

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Does the anti-alienation provision of the Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1036(d)) prevent imposition of a constructive trust under the Labor Management Reporting and Disclosure Act of 1959 (29 U.S.C. § 401 *et seq.*), on the pension benefits of a union official who has obtained those benefits by breaching his fiduciary duties to both the union and its benefit plans?

2. If not, does the imposition of such a constructive trust constitute a garnishment within the meaning of the Consumer Credit Protection Act (15 U.S.C. § 1671), so as to permit this union official to receive 75% of those benefits?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
STATUTES AND REGULATIONS	1
STATEMENT OF THE CASE	3
A. Facts	3
B. Legal Proceedings	4
SUMMARY OF ARGUMENT	8
ARGUMENT	11
I. THE LMRDA AUTHORIZES THE CONSTRUCTIVE TRUST IMPOSED ON GUIDRY'S BENEFITS AS A FEDERAL EQUITABLE REMEDY FOR HIS BREACH OF FIDUCIARY DUTIES, AND IS NOT AFFECTED IN THIS REGARD BY THE ANTI-ALIENATION PROVISION OF ERISA	11
A. The legislative history of the LMRDA indicates that a primary purpose of Title V was to assure appropriate remedies, including imposition of constructive trusts, for breaches of fiduciary duties by union officers	13
B. Imposition of a constructive trust in this case furthered the purposes of the LMRDA and was consistent with general principles of trust law	20
C. Since the LMRDA authorizes the constructive trust here, ERISA, by its express terms, cannot modify, impair or supersede that authorization	25
1. Application of ERISA § 206(d)(1) to protect Guidry's pensions would impair the LMRDA	25

TABLE OF CONTENTS—Continued

	Page
2. ERISA § 514(d) precludes the application of § 206(d)(1) to restrict an appropriate LMRDA remedy	26
3. No general rules of statutory construction support ignoring the clear dictates of ERISA § 514(d)	29
II. BECAUSE OF THE CLOSE RELATIONSHIP BETWEEN GUIDRY'S LMRDA VIOLATIONS AND HIS BREACHES OF FIDUCIARY RESPONSIBILITY IN HIS ROLE AS TRUSTEE OF THE LOCAL FUNDS, ERISA ITSELF SUPPORTS IMPOSITION OF A CONSTRUCTIVE TRUST UPON GUIDRY'S PENSION	32
A. Contrary to the representations of the petitioner and the government, the record demonstrates that Guidry breached his fiduciary duty to the Local 9 Funds as well as to the union	33
B. Since, under ERISA, the anti-alienation provision does not bar recovery of money received in breach of fiduciary obligations by a fund trustee who is also a fund beneficiary, the provision should not be read to bar recovery from that same fund for breaches of fiduciary duty under the LMRDA intimately linked with ERISA breaches of trust	36
III. THE IMPOSITION OF A CONSTRUCTIVE TRUST IN THIS CASE IS NOT AN EQUITABLE PROCESS THROUGH WHICH GUIDRY'S EARNINGS ARE REQUIRED TO BE WITHHELD FOR THE PAYMENT OF DEBT AND THEREFORE IS NOT COVERED BY THE CONSUMER CREDIT PROTECTION ACT	41
CONCLUSION	46

TABLE OF AUTHORITIES

Cases	Page
ALPA v. Northwest Airlines, Inc., 627 F.2d 272 (D.C. Cir. 1980)	27
Ashton v. Cory, 780 F.2d 816 (9th Cir. 1986)	27
AT&T v. Merry, 592 F.2d 118 (2nd Cir. 1979)	21, 31
Atwater v. Roudebush, 452 F. Supp. 622 (N.D. Ill. 1976)	46
Bache Halsey v. Killop, 589 F. Supp. 390 (E.D. Mich. 1984)	46
Banks v. Bryant, 497 So.2d 460 (Ala. 1986)	43
Borden v. Sinskey, 530 F.2d 478 (3rd Cir. 1976)	43
Bugher v. Feightner, 722 F.2d 1356 (7th Cir. 1983), *cert. denied*, 469 U.S. 822 (1964)	27
Calhoun v. FDIC, 653 F. Supp. 1288 (N.D. Tx., 1987)	28
Connors v. Amex Coal Co., 858 F.2d 1226 (7th Cir. 1988)	27
Crawford v. La Boucherie Bernard, 815 F.2d 117 (D.C. Cir. 1987), *cert. denied*, 108 Sup. Ct. 735 (1988)	21, 36, 39
Ellis National Bank v. Irving Trust Co., 786 F.2d 466 (2nd Cir. 1986)	12
FDIC v. Farah, —— F.2d ——, 11 EBC 1142 (10th Cir. 1989)	28
Glover Construction Company v. Andrus, 591 F.2d 554 (10th Cir. 1979), *aff'd, Andrus v. Glover Construction Co.*, 446 U.S. 608 (1980)	29
Goff v. Taylor, 706 F.2d 576 (5th Cir. 1983)	21
Guth v. Loft Inc., 23 Del Ch. 255, 5 A.2d 503 (Sup. 1939)	44
Highway Truck Drivers and Helpers v. Cohen, 334 F.2d 378 (3rd Cir. 1964), *cert. denied*, 379 U.S. 921 (1964)	24
Hooper v. Yoder, 737 P.2d 852 (Colo. 1987)	43
In re Bereton's Estate, 130 A.2d 453 (Pa. 1957)	38
In re Burr, 257 N.Y.S. 654 (Sup. Ct. 1932), aff'd, 263 N.Y.S. 945 (N.Y. App. Div. 1933)	39
In re Hysick, 90 B.R. 770 (BC ED Pa. 1988)	28
In re Van Nostrand's Will, 29 N.Y.S. 2d 857 (Sup. Ct. 1941)	38

TABLE OF AUTHORITIES—Continued

Page

In re Watson, 449 N.E. 2d 1156 (Ind. Ct. App. 1983) 38
Local No. 92 International Association of Bridge Workers v. Norris, 383 F.2d 735 (5th Cir. 1967) 23
Mendez-Bellido v. Board of Trustees, 709 F. Supp. 329 (E.D. N.Y. 1989) 45
Ridgway v. Ridgway, 454 U.S. 46 (1981) 44, 45
Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1988) .. 26
Strobnicki v. Textron, 868 F.2d 1460 (5th Cir. 1989) 21, 31
United Mine Workers v. Boyle, 567 F.2d 112 (D.C. Cir. 1977), cert. denied, 435 U.S. 956 (1978) 34
Western v. Hodgson, 494 F.2d 379 (4th Cir. 1974) 46
Yiatchos v. Yiatchos, 376 U.S. 306 (1964) 45

Statutes

Federal Deposit Insurance Act, 12 U.S.C. § 1811 *et seq.* 28
National Labor Relations Act, 29 U.S.C. § 151 *et seq.* 3
Labor-Management Reporting and Disclosure Act, 73 Stat. 519, 29 U.S.C. § 401 *et seq.*
§ 501, 29 U.S.C. § 501 ..... 6, 12, 44
§ 501(a), 29 U.S.C. § 501(a) 1,8, 13, 22, 23
§ 501(b), 29 U.S.C. § 501(b) 1, 12, 17, 21
§ 501(c), 29 U.S.C. § 501(c) 4
§ 504(a), 29 U.S.C. § 504(a) 23, 30
§ 603(a), 29 U.S.C. § 523(a) 31
Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*
§ 3 (14), 29 U.S.C. § 1002(14) 35
§ 200(d), 29 U.S.C. § 1056(d) 7, 11, 25, 26, 31, 45
§ 406, 29 U.S.C. § 1106 35
§ 409(a), 29 U.S.C. § 1109(a) 36
§ 514(a), 29 U.S.C. 1144(a) 12, 26, 27

TABLE OF AUTHORITIES—Continued

Page

§ 411, 29 U.S.C. § 1111 23
§ 514(d), 29 U.S.C. § 1144(d) 8, 9, 12, 22, 25, 26, 27, 28
Consumer Credit Protection Act, 15 U.S.C. § 1671 .. 29, 31
15 U.S.C. § 1672(c) 41

House and Senate Bills

H.R. 8342, 86th Cong., 1st Sess. (1959) 18
S. 1555, 86th Cong., 1st Sess. (1959) 13, 14, 18

Legislative History

105 Cong. Rec. (Daily April 25, 1959) 18
105 Cong. Rec. 14519-20 19
105 Cong. Rec. S5854 (Daily April 23, 1959) 15, 16, 17
105 Cong. Rec. S15899 (Daily Aug. 28, 1959) 19
105 Cong. Rec., Sen.-Sept. 3, 1959 19
H. Rep. No. 741 on H.R. 8342, 86th Cong., 1st Sess. (1954) 19
Hearings before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, Labor-Management Reform Legislation, 86th Cong., 1st Sess. 1959 21
I Legislative History of the Labor-Management Reporting and Disclosure Act of 1985 ..... 13, 14
II Legislative History of the Labor-Management Reporting and Disclosure Act of 1985 .. 15, 16, 17, 18, 25
S. Rep. No. 187 on S. 1555, 86th Cong., 1st Sess. (1959) 14

Regulations and Rules

26 C.F.R. 1.401(a)-13(b)(1) 11
Ruling 80-27, 1980-1 C.B. 85 11
Sup. Ct. Rule 34.1(a) 22

Miscellaneous

Bogert, *Trusts and Trustees* (2d ed. 1979) at 484 .. 38
Cox, "Internal Affairs of Labor Unions Under the Labor Reform Act of 1959," 58 Mich. L. Rev. 819, 828 (1960) 22, 38

TABLE OF AUTHORITIES—Continued

	Page
Griswold, *Spendthrift Trusts*, 2nd Ed.	21, 39
Palmer, *Law of Restitution*, 1978	20
Restatement of Restitution	20
Restatement of Trusts, Second	21
Scott, *On Trusts*, 4th Ed. 1989	20, 38, 39, 42, 43
Sutherland, *Statutory Construction*, 4th Ed.	29

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1105

CURTIS GUIDRY,

Petitioner,

v.

SHEET METAL WORKERS NATIONAL PENSION FUND; SHEET METAL WORKERS LOCAL UNION AND COUNCILS PENSION PLAN; SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 9; SHEET METAL WORKERS LOCAL NO. 9 PENSION FUND, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

RESPONDENTS' BRIEF

STATUTES AND REGULATIONS

In addition to those cited by Petitioner, the following is involved in this case:

1. Sections 501(a) and 501(b) of the Labor-Management Reporting and Disclosure Act, 73 Stat. 519, 29 U.S.C. § 401 *et seq.*:

(a) Duties of officers; exculpatory provisions and resolutions void. The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.

(b) Violation of duties; action by members after refusal of failure by labor organization to commence proceedings; jurisdiction; leave of court; counsel fees and expenses. When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after

being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

STATEMENT OF THE CASE

A. Facts

From 1961 through September 30, 1981 Curtis Guidry served as Financial Secretary Treasurer of Sheet Metal Workers Local 9 ("the Union") (J.A. 19); from 1964 through September 30, 1981, he was Business Manager of the Union. (*Id.*). During the periods pertinent to this lawsuit, Local 9 was party to at least two joint labor management trust funds organized pursuant to § 302(c) of the National Labor Relations Act, the Sheet Metal Workers Local No. 9 Health and Welfare Fund ("Welfare Fund") and Sheet Metal Workers Local No. 9 Pension Fund ("Local Pension Fund"). (J.A. 29 and 44). Guidry was elected trustee of the Welfare Fund in 1962 and of the Local Pension Fund in 1967. (J.A. 20). He was Chairman of the Board of both Plans and retained those positions until 1981. (*Id.*) At various times during Guidry's term as officer of Local 9, that Union, under Guidry's direction, made contributions in his be-

half to the three pension funds which are parties to this action. (J.A. 31, para. 11).

In 1981, the U.S. Department of Labor conducted a review of Local 9's accounting procedures. This resulted in discovery of Guidry's massive embezzlements, and led to Guidry's resignation from the Union. (J.A. 20). Local 9 then commissioned an audit of its financial records by Arthur Young and Company for the period from January, 1970 through September, 1981. (J.A. 22-27). The audit disclosed that $998,281.00 was missing. (J.A. 26). Included in that amount was a total of $338,580 in checks written to Local 9 by the Local Pension Fund and the Welfare Fund as reimbursement for clerical services performed by the Union for the Funds. These checks were diverted into Guidry's personal bank accounts. (J.A. 25 and 26). At the time of his departure from the Union, the Union's cash assets were reduced to $150,000, rendering the large union operation nearly insolvent. (J.A. 74).

B. Legal Proceedings

These revelations precipitated numerous legal actions. First, Guidry was criminally charged with violating 29 U.S.C. § 501(c). (J.A. 79). On March 31, 1982, Guidry pled guilty to those charges, admitting to thefts between April 1, 1977 and September 30, 1981 totalling $377,-301.53. (J.A. 83). That amount included $228,191.63 which represented some of the embezzled checks on the Welfare and Local Pension Fund accounts to which Arthur Young had referred in its report. (J.A. 84, paras. 4 and 5).

Second, in 1981 the Union brought an action against Guidry in a Colorado court (Denver District Court, Civil Action No. 81-CV-10374) alleging *inter alia* fraud and breach of fiduciary duty. (J.A. 53, para. A).

Third, in 1982, Local 9 brought another state court action against the Welfare Fund and the Local Pension

Fund (Denver District Court, Civil Action No. 82-CV-3128) claiming that it had not been paid for the clerical services which it performed because Guidry embezzled the checks written on the accounts of the two Funds before Local 9 received them. (J.A. 43 and 44). The trust funds answered. They claimed that the Union, through Guidry, had received those funds, and joined Guidry as a third party defendant, alleging *inter alia* that Guidry owed the Funds any amounts they owed to the Union. The local funds also claimed $85,176.00 against Guidry for "excess monies"—that is, checks made payable to the Union for amounts beyond those the Funds owed to the Union, and then deposited in Guidry's bank account. (J.A. 44). Guidry counterclaimed against the Local Pension Fund for his pension. (J.A. 45).

The litigation between Local 9 and its Trust Funds proved very costly. The Welfare Fund and Pension Fund alone incurred $45,026.26 in legal expenses defending the Union's claims. (*Id.*) Finally, in January, 1984, the local trust funds paid the Union $75,000 in settlement of its claims. (J.A. 44). Then, in May, 1985, Guidry and the local funds settled their claims. (J.A. 43 through 46). Guidry stipulated to entry of a judgment in favor of the local funds and against himself of $205,202.26 representing all sums owed to the Funds for the "excess monies," the settlement paid to the Union, and the local funds' legal expenses for defending the Union's claims. (J.A. 45). However, the Funds agreed to the satisfaction of this judgment upon Guidry's payment of $20,000.00 to the local funds' fidelity bond insurance carrier. (J.A. 46). The Local Pension Fund further agreed to pay Guidry his pension. (*Id.*)

Guidry instituted the present action in April, 1984 against the Sheet Metal Workers National Pension Fund and the Sheet Metal Workers Local Unions and Councils Pension Fund (the "National Funds") claiming early retirement benefits. (J.A. 4-10). Local 9 intervened and joined the Local 9 Pension Fund as a rule 19 party.

(J.A. 29-36). In the first claim of the Intervenor's Complaint, Local 9 asserted that Guidry violated his fiduciary duties toward the Union and its members under the Landrum-Griffin Act (29 U.S.C. § 501). (J.A. 32-35). Local 9 stated four succeeding state law claims. (J.A. 33-35). In the sixth claim Local 9 sought imposition of a constructive trust on Guidry's pensions until Local 9 was made whole. (J.A. p. 35).

In January, 1986, Local 9 and Guidry settled the pending state court action between them and the first five claims in the instant action. (J.A. 52-58). Guidry stipulated to entry of judgment of $275,000 and agreed to finalization of that judgment under Rule 54(b) F.R.C.P. (J.A. 55). In the settlement agreement, Guidry conceded that the judgment was for money he obtained in the commission of actual fraud while acting in a fiduciary capacity. (J.A. 56). He also stated that he had none of the embezzled funds in his possession at the time of the settlement. (J.A. 55-56). Local 9 reserved its right to collect the $275,000 judgment either by prosecuting the sixth claim for relief or otherwise. (J.A. 57). The U.S. District Court entered judgment under Rule 54(b) on the first five claims on January 14, 1986. (J.A. 59).

Local 9 then had writs of garnishment issued on the three Funds and, alternatively, moved for summary judgment on its sixth claim for relief in the federal court action, seeking imposition of a constructive trust. (J.A. 66-95). The three Funds answered both writs of garnishment, denying they owed Guidry his pensions. (See e.g. J.A. 67 and 91). Local 9 traversed the two sets of answers and requested a hearing. (J.A. 71 and 95).

The federal district court heard both Local 9's motion for summary judgment on its sixth claim and the traverse to answers to writs of garnishment on July 17, 1986. (Cert. Pet. C-1 and C-2). At the conclusion of the hearing, the Court granted Local 9's motion on its sixth

claim and specifically denied relief under the writs of garnishment. (Cert. Pet. C-20 and C-22). In its written opinion confirming its imposition of a constructive trust on Guidry's pension proceeds, the district court rejected Guidry's contention that the anti-alienation provision of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1056(d)(1), prevents imposition of a constructive trust under these circumstances:

> The question is . . . how to interpret the non-alienability provision's effect on other federal statutes. . . . When it became apparent that certain union officers abused the power they acquired, Congress regulated the internal affairs of labor organizations by its passage of the Landrum-Griffin Act. . . . Congress intended to protect employees from improper practices of . . . the employees' own elected union officials. In circumstances where the viability of a union and the members' pension plans was damaged by the knavery of a union official, a narrow exception to ERISA's anti-alienation provision is appropriate.

(Cert. Pet. B-1-B-4).

The Tenth Circuit affirmed, finding that since Guidry was a fiduciary who had damaged the pension fund, the anti-alienation provision of ERISA (29 U.S.C. § 1056(d)) did not bar imposition of a constructive trust on Guidry's benefits. (J.A. 104-111). The Court went on to hold, disagreeing with Guidry's argument to the contrary, that a constructive trust is appropriate under the circumstances of this case even though the contributions deposited in the pension funds did not come directly from the embezzled checks.[1] Finally, the Tenth Circuit re-

---

[1] The propriety of this aspect of the Tenth Circuit's decision has not been challenged in this Court. *See* Cert. Pet. at (i). Thus, at this juncture the propriety under ordinary trust principles of a constructive trust in the circumstances of this case must be taken as established. The open question is whether ERISA's anti-alienation provisions prevent the courts from providing the constructive trust remedy for breach of a union officer's fiduciary duty.

jected the contention that 75% of Guidry's pension benefits are exempt from the imposition of a constructive trust under the garnishment provisions of the Federal Consumer Credit Protection Act (15 U.S.C. § 1671 *et seq.*), holding that Guidry had failed to comply with the procedural requirements of the Colorado Garnishment Law.[2] (J.A. 115-118). The Tenth Circuit, therefore, never reached the merits of the question whether the district court correctly decided that the Consumer Credit Protection Act does not apply to constructive trusts.

SUMMARY OF ARGUMENT

I. The constructive trust imposed by the district court upon Guidry's pension benefits was appropriate relief under the LMRDA. The legislative history of that statute indicates that the primary purposes of §§ 501(a) and (b) of the Act were to federalize the fiduciary obligations of union officers, and to insure that restitution would actually be made by defalcating officers to the unions and members from whom those officers stole. In particular, in enacting those sections of the Act. Congress intended to incorporate traditional trust remedies, which include imposition of constructive trusts over assets obtained in breach of fiduciary duty. The constructive trust imposed in this case was both appropriate, given the particular nature of Guidry's fiduciary breaches, and necessary to fulfill thhe LMRDA's purposes, since there was no other way for the union to recover any part of the funds taken from it.

Because the constructive trust was in this instance both an appropriate and a necessary remedy, to preclude that remedy would fundamentally impair the operation of the LMRDA. Section 514(d) of ERISA, however, expressly states that ERISA does not modify, impair or supersede any other federal statute. Consequently, the anti-

---

[2] The respondents never raised this procedural issue in the courts below.

alienation provisions of ERISA may not be construed as barring the remedy imposed by the district court in this case, since to do so would severely compromise the application of the LMRDA. Moreover, since § 514(d) of ERISA explicitly states the relationship between ERISA and other federal statutes, general precepts of statutory construction have no place in determining that relationship; rather, the plain terms of ERISA must govern.

II. The constructive trust in this case is consistent with, rather than opposed to, the basic purposes and provisions of ERISA. The record establishes that Guidry in fact violated his fiduciary duty to the Local 9 Pension and Welfare Trusts, as well as to the union. The mechanism of those violations of trust were such that in most instances, Guidry's dual fiduciary capacity was essential to accomplishing the theft; in addition, because the same individuals, the union members, were for the most part the beneficiaries of both the Funds and the union, establishing precisely from which entity each part of the embezzled funds was taken would only have succeeded in damaging those individuals' beneficial interests in both trusts.

Under ERISA itself the anti-alienation provision would not prevent co-beneficiaries of the Funds from reaching Guidry's benefits. That statute, in 29 U.S.C. § 1109(a), expressly provides that faithless fiduciaries are personally liable to make up a shortfall in trust funds. Further, established trust law, incorporated by Congress in enacting ERISA, does not allow anti-alienation provisions (or other devices that ordinarily shield assets from creditors) to shield from the reach of co-beneficiaries the beneficial interest of a fiduciary who has breached his trust relationship. Since, under ERISA itself, the anti-alienation provision may not be read to bar an effective remedy for breach of trust by a trust fund fiduciary, so ERISA may not be read as barring such a remedy under the LMRDA, where, on the actual facts of the case, that remedy serves

to advance the purposes of the ERISA as well as of the LMRDA.

III. Finally, the imposition of a constructive trust is not an equitable process for the withholding of Guidry's earnings under the Consumer Credit Protection Act (or, for that matter, an alienation of Guidry's pension under ERISA).

Constructive trusts have traditionally been viewed as an equitable tool for preventing and correcting fraud. Such trusts arise *at the time of the fraud* (though later construed by a court), and amount to a declaration that the legal title holder of certain property received that title only through his fraud and *never* had any equitable interest in the property so received (or its proceeds) at all.

Guidry's pensions are the proceeds of contributions which would never have been made but for Guidry's fraudulent concealment of his embezzlements, concealment which was itself unlawful under both the LMRDA and ERISA, and which constitutes an independent violation of those acts. The contributions further represent double compensation to Guidry when viewed against the background of the money he stole, money which exceeded his just compensation. Thus, applying constructive trust principles, the contributions, and therefore the benefits derived from them, never properly belonged to Guidry. Because the district court's recognition of a constructive trust did not withhold from Guidry any earnings that were ever properly his, the CCPA has no application to this case.

ARGUMENT

I. THE LMRDA AUTHORIZES THE CONSTRUCTIVE TRUST IMPOSED ON GUIDRY'S BENEFITS AS A FEDERAL EQUITABLE REMEDY FOR HIS BREACH OF FIDUCIARY DUTIES, AND IS NOT AFFECTED IN THIS REGARD BY THE ANTI-ALIENATION PROVISION OF ERISA.

Petitioner, and the United States as *amicus curiae* in support of petitioner, treat this case as one principally raising the broad question whether courts can create a general implied exception to the anti-alienation provision of ERISA, 29 U.S.C. § 1056(d),[3] for situations in which the potential pension beneficiary has engaged in criminal misconduct resulting in financial loss to the employer.[4] But this case was, and should be, resolved upon a much narrower basis, grounded in its actual facts.

---

[3] That section provides simply that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated."

[4] In so contending, the government relies in part upon a Treasury Department regulation, 26 C.F.R. 1.401(a)-13(b)(1), for the proposition that "ERISA precludes garnishment of pension benefits by general creditors of plan participants." Brief for the United States as *Amicus Curiae* Supporting Petitioner ("*Amicus* Br.") at 11. But the question in this case does not involve garnishment, and, more importantly, the case does not concern "general creditors of plan participants," as we develop below. Moreover, the regulation the government relies on in no way takes account of the actual LMRDA context of this case. Further, the government itself has recognized that the regulation in question does not preclude all exceptions to ERISA's anti-alienation provisions in order to further other federal statutory purposes, since the government has in several instances supported such exceptions. See pp. 21 and 23, *infra*.

Finally, the regulation concerns the structure of the plans themselves, and on its face is not relevant to the question of the tax status of plans which honor *court-ordered* garnishment or trusts. In fact, prior to the 1984 ERISA amendments relating to qualified domestic relations orders, the Internal Revenue Service had held, in Rev. Ruling 80-27, 1980-1 C.B. 85, that the tax exempt status of a plan would *not* be compromised by honoring a court

In ERISA § 514(d) (29 U.S.C. § 1144(d)), Congress announced that ERISA "shall not be construed to . . . modify, . . . impair, or supersede any law of the United States" other than those specifically enumerated. The judgment in this case was one under a "law of the United States"—Title V of the Labor Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. § 501. That statute designates the officers of labor organizations as fiduciaries under federal law, and authorizes suits against them in which courts may grant damages, an accounting, or "other appropriate relief." 29 U.S.C. § 501(b). In imposing the constructive trust on Guidry's pension benefits and thereby assuring that the union members would not suffer because of Guidry's flagrant breaches of his fiduciary responsibility, the district court vindicated both the express terms of the LMRDA and the statutory purposes as explicated in the statute's legislative history. To hold that the only meaningful remedy available in this case for the LMRDA violation is barred by ERISA would be fundamentally to impair the operation of the LMRDA, by permitting union officers to violate their fiduciary responsibilities to union members with financial impunity. The appropriate conclusion is therefore, that ERISA's anti-alienation provision does not bar the imposition of a constructive trust to recompense a union for breach of an LMRDA fiduciary duty by a union officer.[5]

---

order to meet a plan participant's alimony or support obligation. Thus, not only is the regulation cited addressed to a different question than that now before the court, but the regulation has not been viewed by the agency issuing it to be relevant under the present circumstances.

[5] The Second Circuit's holding in *Ellis National Bank v. Irving Trust Co.*, 786 F.2d 466 (2nd Cir. 1986), is not inconsistent with this conclusion. The court in that case held that § 514(a) of ERISA (29 U.S.C. § 1144(a)) preempts a constructive trust imposed under state law. Here, the constructive trust is a creature of the LMRDA, a federal statute.

A. The legislative history of the LMRDA indicates that a primary purpose of Title V was to assure appropriate remedies, including imposition of constructive trusts, for breach of fiduciary duties by union officers.

As here pertinent, Title V of the LMRDA states generally that

> officers . . . of a labor organization occupy a position of trust in relation to such organization and its members as a group. It is, therefore, the duty of such person . . . to hold its money and property solely for the benefit of the organization and its members . . . and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him . . . on behalf of the organization. [29 U.S.C. § 501(a).]

Section 501(b) sets forth the remedies for violations, including "other appropriate relief."

The legislative history of 29 U.S.C. §§ 501(a) and (b) makes it clear that the basic purpose of including a statement of union officers' fiduciary responsibility in § 501(a) was to provide federal courts with broad remedial authority to insure recovery to unions and their members victimized by fiduciary breaches. In particular, the lawmakers frequently stated their intention to incorporate traditional trust remedies—which include the constructive trust—into federal law.

After extensive investigation by the McClellan Committee in 1957-1959, several bills were introduced in the Senate early in the latter year designed to stem corruption in labor unions. Senators Kennedy and Ervin introduced the legislation which eventually passed the Senate in March, 1959. S. 1555, 86 Cong., 1st Session (1959), reprinted in National Labor Relations Board, *I Legislative History of the Labor Management Reporting and Disclosure Act of 1959* (*Leg. Hist.*), at 338-396. While the Kennedy-Ervin bill contained allusions to the fiduciary capacity of union officers in its preamble, it did not federalize the fiduciary relationship, and provided no

remedies for breach of fiduciary duty. S. 1555 *supra*, § 2(a) and (c) reprinted in I *Leg. Hist.*, *supra*, at 339-341.

When the Kennedy-Ervin bill was reported out of the Senate Committee on Labor and Public Welfare, Senators Dirksen and Goldwater roundly criticized it in a minority report for its failure to authorize equitable remedies for breach of union officers' fiduciary responsibility, including, specifically, the constructive trust:

> The committee bill professes to recognize the fiduciary nature of the union official's relation to his union and its members, but makes no provision to establish such relationship, to impose the duties of a fiduciary on union officials, or to give union members any remedy for a breach of the fiduciary obligation.
>
> In virtually every state in the nation, the officers and directors of corporations are made fiduciaries by statute and held to the strictest accountability in their handling of corporate funds and property. *Moreover, any profit or gain which accrues to them by virtue of their official position, even if no damage to the corporation or stockholder, results, is held in a constructive trust for the benefit of the corporation and its stockholders.* Under these statutes, stockholders are given the right to enforce the fiduciary obligation through a suit in the courts. The same obligations and remedies attach to the officers and directors of non-profit and eleemosynary corporations-churches, hospitals, charitable institutions, etc. Union officials alone seem to be free from what has become a normal, in fact a universal, obligation of officials similarly situated.

[S. Rep. No. 187 on S. 1555, at 72, reprinted at *I Leg. Hist.*, *supra*, at 468 (emphasis added).]

The minority report went on, in Appendix C (S. Rep. No. 187 *supra*, at 109, reprinted at *I Leg. Hist.*, at 505) to support its contention that states generally hold corporate directors to fiduciary standards by listing the

states in which corporate directors occupy fiduciary capacities, concluding:

> The director's position is one of trust and is frequently denominated a trustee under an implied or *constructive trust*, and held accountable in equity for his actions.

(Emphasis added.)

In response to these criticisms, Senators McClellan and Javits introduced two separate amendments on the floor of the Senate on April 23, 1959. Senator McClellan's amendment substantively imposed fiduciary obligations on union officers in the handling of union money and property. The intent in imposing those obligations was precisely to refer to, and to incorporate, traditional common law principles regarding breaches of trust by fiduciaries, as Senator McClellan explained:

> It should be provided as a matter of law that such officers will be acting in a fiduciary capacity. That is true of officers of other institutions who act as trustees or handle money in trust, or are considered fiduciaries by reason of being officers who handle money. But in the bill a declaration of policy is made that is in the national interest. I simply say it ought to be provided in the bill that such officers have fiduciary responsibilities.

[105 Cong. Rec. S5854 (Daily ed. April 23, 1959) (remarks of Sen. McClellan), reprinted in *II Leg. Hist.*, at 1128.] [6]

---

[6] It is noteworthy that Sen. McClellan was particularly concerned with breaches of trust that involved manipulation of pension or severance pay funds, and believed that his amendment would protect against such manpulation:

> Mr. McCLELLAN. . . . I may remind my distinguished colleague—and I say this for the information of all senators—that the Teamsters Union in St. Louis was bought out and paid off. The officers were, in effect, bought out, and the

During discussion of the McClellan amendment, there was general recognition that most of the acts that would be reached by imposing fiduciary standards as a matter of federal law were already prohibited under state law. *See*, e.g., remarks of Sen. Ervin at 105 Cong. Rec. S5855 (Daily ed. April 23, 1959), reprinted in *II Leg. Hist.* at 1129; remarks of Sen. Kennedy, *id.*, at S5856, reprinted in *II Leg. Hist.* at 1130; and remarks of Sen. Goldwater, *id.*, at S5859, reprinted in *II Leg. Hist.*, at 1133. Nonetheless, it was argued, an effective federal *remedy* was necessary in order to provide greater protection for unions and their members from breaches of trust by union officials, because corrupt union officials had been able to elude state legal remedies and retain the profits of their thefts.

Thus, Senator Goldwater, who had first raised the fiduciary responsibility issue in the minority report explained:

> . . . We propose this amendment only in order to provide some relief . . . because I know of no existing law which makes possible the recovery of funds which are improperly taken from a labor organization by one of its leaders. For instance, the vast sums of money which Dave Beck took from his union can never be recovered by law, according to my understanding.

[*Id.* at S5859, reprinted in *II Leg. Hist.* at 1133].

Similarly, Senator McClellan indicated that the intent of his amendment was to assure that union officers could

---

> union was turned over to the person who is there now, Gibbons. How was that money obtained? The retirement pay money was used.
>
> Mr. CURTIS. Or severance pay.
>
> Mr. McCLELLAN. Yes. The retirement or severance pay money was given to the officers who were bought out.
>
> I do not think the union members, the working people, pay the dues in the unions for that sort of manipulation. If we establish a fiduciary responsibility under the law, I do not think union officers could perpetrate such acts.

not employ legal technicalities to escape their responsibility *actually to repay misappropriated funds to the union*. Senator McClellan explained:

> The amendment would retain the fiduciary responsibility irrespective of any effort to get around the law and to evade the obligation, as is now being done. . . . We cannot go too far in making the law positive that we mean that those concerned shall be responsible for the money *and shall account for it.*

[*Id.* at S5856, S5858, reprinted in *II Leg. Hist.* at 1130, 1132. (Emphasis added)].

Senator Javits was especially concerned with the effective remedy issue, and was convinced that a substantive statement that union officials are subject to a federal fiduciary obligation was insufficient to assure a remedy:

> Mr. JAVITS. . . . Once fiduciary responsibility is stated it will soak up all the common law, all the state law, and all the federal law. Really what we need in the bill, to give it teeth, . . . is some remedy.
>
> I ask the Senator if he does not feel that notwithstanding the adoption of the pending amendment we must go still further to try to cast a net for the whole fiduciary responsibility problem?

[*Id.* at S5855, reprinted in *II Leg. Hist.* at 1129.]

To address his concern, after Senator McClellan's amendment passed unanimously (*id.* at S5860, reprinted in *II Leg. Hist.* at 1134), Senator Javits introduced an amendment that extended to unions and their members the right to sue to recover misappropriated union funds "or for other appropriate relief." 105 Cong. Rec. S5854-5861 (Daily ed. April 23, 1959), reprinted at *II Leg. Hist.*, at 1128-1135. The phrase "other appropriate relief" from the latter amendment eventually found its way into the LMRDA, 29 U.S.C. § 501(b); it is that phrase which is the focus of attention in this case.

Just as Senators Dirksen and Goldwater had analogized union fiduciaries to corporate directors in contending that the illegitimate gains of union officials must be held in constructive trust, Senator Javits borrowed from the corporate fiduciary duty model in devising his remedial provision. As he stated:

> This is the traditional technique pursued in stockholder derivative suits, and the amendment would extend the same rights and opportunities to the union members.

[*Id.* at S5860, reprinted in *II Leg. Hist.* at 1134.]

The amendment met with general approval, with key senators expressing the view that the Javits amendment would assure effective remedies to enforce the fiduciary responsibilities of union officers. *See, e.g., id.* at S5860, reprinted in *II Leg. Hist.* at 1134 (remarks of Sen. McClellan) ("I think the bill now will actually afford some real protection, and will give a remedy which will improve the fiduciary relations of some people who, I know, have in the past abused those relations."); *id.* at S5861, reprinted in *II Leg. Hist.* at 1135 (remarks of Sen. Kennedy) ("[S]ince this amendment is well drawn, I accept it, because I believe that it provides for an effective right to enforce the fiduciary remedies which we have made available in a previous amendment.") After a brief debate, the amendment was passed and with the fiduciary provisions included, S. 1555 passed the Senate on April 25, 1959.[7]

In the House of Representatives, the Elliott Bill, H.R. 8342, was introduced on July 23, 1959. *I Leg. Hist.* 759-946. That bill contained the identical fiduciary provisions later adopted in the Landrum-Griffin version of the bill and enacted as § 501 of the final statute. In a supplemental report regarding that bill, several committee members, including Congressman Elliott, made it clear

[7] 105 Cong. Rec. (Daily ed. April 25, 1959) at § 6048, reprinted in *II Leg. Hist., supra*, at 1257.

that the intent was to incorporate traditional legal principles concerning trust relationships:

> The general principles stated in the bill are familiar to the courts, both state and federal, and therefore incorporate a large body of existing law applicable to trustees, and a wide variety of agents.

[H.R. No. 741 on H.R. 8342, 86th Cong. 1st Sess. 1959 at 81, reprinted at *I Leg. Hist.* 839. Thus, like the Senate version, the House bill also envisioned that the courts would apply traditional trust principles in enforcing the fiduciary provisions of the Act.

The Landrum-Griffin Bill was adopted *in toto* by the House as an amendment to the Elliott Bill, H.R. 8342, on August 13, 1959, but the fiduciary provisions remained the same as in the Elliott Bill. 105 Cong. Rec. H14519-20 (Daily ed. Aug. 13, 1959.) The conference called to reconcile the House and Senate versions adopted the House version of the fiduciary provisions. 105 Cong. Rec. S15899 (Daily ed. Aug. 28, 1959), reprinted in *II Leg. Hist.* at 1376. In explaining the House version to the Senate, Senator Kennedy read the text of the supplemental House committee report quoted in the previous paragraph, to the effect that general trust principles familiar to the courts would govern the fiduciary capacity of union officers. 105 Cong. Rec. S. (Daily ed. Sept. 3, 1959) at [illegible]15, reprinted in *II Leg. Hist. supra*, 1433.

In sum, the very purpose for which Congress enacted the fiduciary provisions of the LMRDA was to overcome the legal impediments under state law to effective *remedies* for unions and their members when corrupt union officials cause them financial injury. In enacting federal fiduciary duty legislation, Congress expressly intended to authorize traditional eqiutable remedies such as the constructive trust, to ensure that wrongdoers are not only held liable in the abstract, but actually compensate unions for their losses due to their breaches of trust.

B. Imposition of a constructive trust in this case furthered the purposes of the LMRDA and was consistent with general principles of trust law.

As the minority members of the Senate Committee noted when the question of adding fiduciary responsibility provisions to the Landrum-Griffin Act was first raised, constructive trusts are prominent among the general trust principles incorporated into the LMRDA. The English origins of the constructive trust date to the seventeenth century. See I Palmer, *Law of Restitution*, (1978), 19. American cases have applied the remedy since at least the mid-19th century. *Id.*, Vol. I at 12.[8]

In brief, a constructive trust is

> [A] remedial device, aimed at preventing unjust enrichment . . . Some of the most important uses of the remedy are to deprive a fiduciary of a gain obtained through the misuse of his position.

I Palmer, *supra*, at 13. The *Restatement of Restitution* specifically authorizes a constructive trust where a party is fraudulently induced to transfer money or property to a third and innocent party. See *Restatement of Restitution* § 167. Moreover, as a general matter, under the traditional law of constructive trusts, "the claimant may follow his property into its product even though the product is property that is exempt from execution." V *Scott on Trusts* (1989) § 508.3.[9]

Hence, in the present case the court applied an equitable remedy traditionally available to redress breaches of trust by recompensing the beneficiaries for their loss while depriving the wrongdoer of the fruits of his

---

[8] The subject of constructive trusts is customarily dealt with in treatises on Trusts. Scott, *On Trusts*, 4th Ed. 1989, Vol V at 300.

[9] *See* pp. 41-46 for further discussion of the nature and purpose of constructive trusts.

breach.[10] As such, imposition of the constructive trust was a remedy fully authorized by the "other appropriate relief" language of LMRDA § 501(b).[11]

---

[10] It would deprive the wrongdoer of the fruits by following them into a spendthrift trust—that is, one with an anti-alienation provision. Indeed, both before and since the enactment of ERISA, authorities have recognized that anti-alienation or spendthrift provisions are subject to numerous exceptions. See Griswold, *Spendthrift Trusts*, 2nd Ed. "Reaching the Interest of the Beneficiary of the Spendthrift Trusts" at 385-488. Griswold acknowledges an exception, for example, when a beneficiary commits or colludes in a breach of trust. (*Id.* at 439). The Restatement of Trusts, Second § 157 enumerates four spendthrift exceptions and allows for additional exceptions based upon public policy. Since enactment of ERISA, the courts have applied exceptions for alimony and support payments, *AT&T v. Merry*, 592 F.2d 118 (2nd Cir. 1979); settlements of disputed claim for benefits, *Stroknicki v. Textron*, 868 F.2d 1460 (5th Cir. 1989); breach of trust by a beneficiary, *Crawford v. La Boucherie Bernard*, 815 F.2d 117 (D.C. Cir. 1987), *cert. denied*, 108 Sup. Ct. 735 (1988). (See also part II below) and bankruptcy, *Goff v. Taylor*, 706 F.2d 576 (5th Cir. 1983). Thus, spendthrift provisions have never been absolute.

[11] Professor Archibald Cox—who was an adviser to the Senate Committee throughout the development of the LMRDA and "perhaps more familiar with the [legislation that became the LMRDA], probably, than anyone in the country" (Hearings before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, Labor-Management Reform Legislation, 86th Cong. 1st Sess. 1959, remarks of Sen. Kennedy)—noted soon after the LMRDA was passed that the statute would indeed sanction the imposition of constructive trusts as a remedy for breach of the fiduciary duties imposed by Title V:

> The principles stated in section 501(a) were drawn from the *Restatement of Agency* in an effort to incorporate the whole body of common law precedents defining the fiduciary obligations of agents and trustees. . . . Under [s]ection 501(b) all the usual remedies for breach of trust are available.
>
> These provisions are potentially among the most important in the LMRDA. . . . [Under them] the Becks, Hoffas and Webers [union officials who were alleged in Congressional hearings to have breached their position of trust] may be required to account not only for alleged misappropriations but also for all the profits which they may have made by virtue of their offices. . . . [E]quity would impose a trust for the benefit of

Further, on the particular facts of this case, the district court was justified in imposing a constructive trust upon Guidry's pension proceeds. Those proceeds were the direct result of Guidry's abuse of his fiduciary position as a union officer, for several reasons.[12]

First, in addition to generally stating that union officers occupy a position of trust with respect to the union and its members, Title V spells out a number of specific fiduciary responsibilities of union officers. One of those responsibilities is that officers must "account to the organization

> for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization.

29 U.S.C. § 501(a).

In its complaint in this case, the union alleged that Guidry breached his fiduciary responsibility by, *inter alia*,

> d. Failing to account to the intervenor for profits received by plaintiff in his embezzlements.

(J.A. 33). In paragraph 8 of his answer to the Union's complaint, Guidry admitted that he did not disclose that he had deposited union funds to his own account, and had instead used the funds as his own. (J.A. 39).

> the [Union] [where a union officer secured an interest in a business with the use of union funds]. [Cox, "Internal Affairs of Labor Unions Under the Labor Reform Act of 1959," 58 Mich. L. Rev. 819, 828 (1960).]

[12] We note again that the question of whether, as a matter of trust law, the constructive trust imposed upon Guidry's pension benefits is proper is not before this Court, since the issue is not one fairly encompassed within the Questions Presented. *See* p. 7, *supra*; Sup. Ct. Rule 34.1(a). Nonetheless, in assessing whether the remedy is a proper one under the LMRDA and therefore one preserved by § 514(d) of ERISA, it is helpful to understand the extent to which the remedy imposed by the district court fits the tradtional model of constructive trust and forwards the overall purposes of the LMRDA (and of ERISA itself).

Had Guidry fulfilled his fiduciary responsibility and disclosed his thefts and then been convicted, as he eventually was, of the embezzlement, he could not, as a matter of law, have remained in his union position: 29 U.S.C. § 504(a) precludes a person convicted of embezzlement from serving as an officer in a labor organization for a period of five years after the end of his conviction or imprisonment.

Likewise, Guidry's schemes to embezzle checks in transit from the local trust funds to the union would have been thwarted had Guidry complied with § 501(a)'s requirement to disclose profits from transactions involving the union. This embezzlement scheme was possible only because of Guidry's dual fiduciary capacity as trustee for the local trust funds and as officer of the union. ERISA, however, prohibits persons convicted of embezzlement and of violations of the LMRDA from acting as a trust fund trustee of a plan for a like five year period. 29 U.S.C. § 1111. Thus, had Guidry not concealed his thefts and had he been convicted of those thefts years earlier, he could not have continued as a trustee, and could not, therefore, have continued the embezzlement itself.

Furthermore, by concealing his embezzlements, Guidry in effect defrauded the Union into compensating him twice for the same work. Over the period in question, Guidry took the amount of his pension contributions and more in his illegal activities. As chief officer of the union, Guidry was finally responsible for the decision to continue to make pension contributions for himself. Thus, the payment of the contributions into the pension fund was an independent breach of Guidry's fiduciary responsibility, since the result was double payment of compensation.[13] As such, the union was entitled, un-

---

[13] As the United States points out at p. 22 of its brief, two unions have ben enjoined from paying compensation to union officers until their LMRDA judgment debts were repaid. *Local No. 92 International Association of Bridge Workers v. Norris*, 383

der constructive trust principles, to follow the funds invested in breach of trust, and to impound the proceeds of those funds, the pension benefits.[14]

Finally, Guidry actually violated two different fiduciary responsibilities in the series of embezzlements in which he engaged—his responsibility under the LMRDA as union official, and his responsibility under ERISA as trustee of the local fund. *See* pp. 33-36, *infra*. While the union and the pension funds are in fact different entities, the members of the union and the beneficiaries of the local trust funds are necessarily largely the same individuals. Thus, the constructive trust in this instance was particularly appropriate, since the result of the trust is to preserve for those union members who are also trust beneficiaries the pension fund assets that would otherwise be used to pay benefits to an individual who had caused direct financial harm to the trust funds and the union.

The district court, under these circumstances, was fully justified under the LMRDA in imposing a constructive trust in order to prevent Guidry from profiting directly from his breach of fiduciary duties. The only question, then, is whether ERISA prevents a district court from vindicating the provisions of the LMRDA in this manner.

F.2d 735 (5th Cir. 1967); *Highway Truck Drivers and Helpers v. Cohen*, 334 F.2d 378 (3rd Cir. 1964), *cert. denied*, 379 U.S. 921 (1964).

[14] For example, had Guidry compensated himself at twice the rate authorized by the union and deposited the excess compensation into an individual, independent annuity fund, the union could have a constructive trust, under the LMRDA, over the money that should never have been paid to the annuity fund on Guidry's behalf, and would be entitled to trace that money into the periodic annuity payments. The result should not vary if, instead, the excess compensation was paid into the union pension funds.

C. Since the LMRDA authorizes the constructive trust here, ERISA, by its express terms, cannot modify, impair or supersede that authorization.

The remaining question is answered by the express terms of § 514(d) of ERISA, 29 U.S.C. 1144(d). That section provides:

> Nothing in this title shall be construed to alter, amend, modify, invalidate, impair or supercede any law of the United States . . . or any rule or regulation issued under any such law.

Since the imposition of a constructive trust on Guidry's pension as the proceeds of his breaches of trust as a union officer is authorized by the LMRDA, the anti-alienation provision of ERISA cannot "modify, impair, or supersede" the LMRDA in this regard.

1. Application of ERISA § 206(d)(1) to protect Guidry's pensions would impair the LMRDA.

Application of ERISA's anti-alienation provision to contravene a constructive trust imposed under the LMRDA would significantly "modify", "impair", and "supersede" the LMRDA. The primary purpose of the fiduciary responsibility provisions of the LMRDA was not to state abstract principles of behavior, but to assure "the recovery of funds which are improperly taken from a labor organization by one of its leaders." 105 Cong. Rec. S5856 (Daily ed. April 23, 1989), reprinted in *II Leg. Hist.* at 1133 (remarks of Sen. McClellan). As a practical matter, if the remedy afforded the union in this case by the district court is not available, the union will never recover any part of the hundreds of thousands of dollars improperly taken from it by Guidry.

Moreover, another primary concern of Congress in enacting Title V of the LMRDA was to eliminate any incentive for union officials to violate their fiduciary responsibilities. Congress' understanding, as we have

seen, was that state law was inadequate precisely because it did not entirely eliminate the incentive to engage in banned acts, since there was no means of depriving defalcating union officers of any profit derived from violations of trust. If union officers are able to preserve the proceeds of pension contributions from the reach of the union even though those contributions were themselves the result of violations of trust, a significant part of the deterrent effect of Title V would be eliminated.

2. *ERISA § 514(d) precludes the application of § 206(d)(1) to restrict an appropriate LMRDA remedy.*

This Court has interpreted ERISA § 514(d) only once, in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983). In *Shaw*, the issue was whether New York State's Human Rights Law and Disability Benefits Law were preempted by ERISA to the extent that they barred certain kinds of discrimination by ERISA-covered plans. The resolution of the issue relating to the Disability Benefits Law was not directly relevant to the instant case; that of the issue relating to the Human Rights Law was, and supports the position of the union in this case.

After disposing with comparative ease of the question of whether the Human Rights Law "relate[d] to" employee benefit plans so as to be preempted under § 514(a) of ERISA, the Court analyzed the more difficult question posed by the appellants' claim that the Human Rights Law was nonetheless saved from preemption by the effect of § 514(d) because state fair employment laws form an integral part of federal law under Title VII. State agencies, appellants argued, play an important role in the enforcement of Title VII. Therefore, they claimed, permitting ERISA to preempt state law would effectively modify the enforcement of Title VII.

The Court rejected this attempt, but did hold that § 514(d) "saves" state law to the extent that state law goes no further than Title VII. In other words, the

holding of *Shaw* was that *only* that part of the law which was exclusively state law was preempted by § 514(a) and not saved by § 514(d).

In its discussion of why this is the case, the Court cited some of the scanty legislative history of § 514(d), and went on:

> *These exchanges demonstrate only the obvious: that § 514(d) does not preempt federal law.* The speakers referred to federal law, the EEOC, and the need for centralized enforcement. The limited legislative history dealing with § 514 (d) is entirely consistent with Congress' goal of ensuring that employers would not face "conflicting or inconsistent State and local regulation of employee benefit plans," 120 Cong. Rec. 29933 (1974) (remarks of Sen. Williams). [Emphasis added.]

463 U.S. at 105.

This "obvious" observation by the Court has been repeated by numerous lower courts in deciding whether and to what extent it is necessary to reconcile provisions of ERISA and of other federal law. *See*, e.g., *Connors v. Amax Coal Co.* 858 F.2d 1226 (7th Cir. 1988) (under § 514(d) ERISA's jurisdictional provisions yield to the requirement that the Court of Appeals review workers compensation claims under the Longshore and Harbor Workers Compensation Act, 33 USC §§ 918-928); *Ashton v. Cory*, 780 F.2d 816 (9th Cir. 1986) (ERISA gives way to the Tax Iniunction Act. 28 USC § 1341); *Bugher v. Feightner*, 722 F.2d 1356 (7th Cir. 1983), *cert. denied*, 469 U.S. 822 (1964) (the right to a jury trial for cases brought under § 301 of the Taft-Hartley Act survived the addition of equitable remedies under § 502 (a)(3) of ERISA for similar violations because of § 514(d); and *ALPA v. Northwest Airlines, Inc.*, 627 F.2d 272 (D.C. Cir. 1980) (ERISA does not override the compulsory arbitration provisions of the Railway Labor Act because of § 514(d)).

A recent lower court decision on the reach of § 514(d) is notable because a federal government agency, the Federal Deposit Insurance Corporation, took a contrary position concerning § 514(d) to that taken by the United States here. In *Calhoun v. FDIC*, 653 F. Supp. 1288 (N.D. Tx., 1987) the FDIC argued, and the court held, that the FDIC could offset amounts owed to a bank under FDIC receivership from the pension account of the former bank president. The court explained that ERISA's anti-alienation provision is subordinate to the FDIC's authority to withhold payments of insured deposits under § 1822(d) of the Federal Deposit Insurance Act because of ERISA § 514(d).[15]

The point should not be belabored. The language of § 514(d) could not have been more comprehensive and emphatic: It provides that *nothing* in ERISA shall in any way undermine the application of any other federal law. Thus, as noted by this Court in *Shaw*, the meaning of ERISA § 514(d) *is* "obvious"—it says, and it means, that ERISA does not impair, modify or supersede any other federal law in any regard. While the instant case is the first in which a court has been asked to interpret that provision specifically in connection with the LMRDA, no reason exists for treating that statute any differently from any other one. Since the LMRDA, taken alone, clearly permits the remedy ordered by the district court, ERISA cannot, by its own terms, be read as modifying, impairing or superseding the operation of the LMRDA in this respect.

---

[15] *But see FDIC v. Farah*, —— F.2d ——, 11 EBC 1142, 1146 fn. 3 (10th Cir. 1989). The FDIC's position in *Farah* was once again that § 514(d) overrides the anti-alienation provision under the circumstances of that case. (The Tenth Circuit initially rejected this position, but the *Farah* decision is currently pending on motion for rehearing, with the FDIC reasserting its previous position.)

Some bankruptcy courts, struggling with the question of whether ERISA trusts are part of the bankruptcy estate under the Bankruptcy Code, have recognized the relevance of § 514(d) to this issue. *See e.g. In re Hysick*, 90 B.R. 770 (BC ED Pa 1988).

3. *No general rules of statutory construction support ignoring the clear dictates of ERISA § 514(d).*

In its brief *amicus curiae*, the United States acknowledges, as it must, the dictates of § 514(d) of ERISA, and then proceeds effectively to ignore them. Recognizing, "of course, that permitting a constructive trust in this case would further the general protective purposes of the LMRDA" (*Amicus* Br. at 23), the government argues nonetheless that the *general* purposes of the LMRDA must give way to the *specific* anti-alienation provision of ERISA.

In doing so, the government purports to be following two general rules of statutory construction. Given the express language of § 514(d), however, neither of those two general principles applies here.

The first general rule of statutory interpretation invoked by the government is the one which states that, when "general" and "special" acts are *in pari materia*, the "two should be harmonized if possible; but if there is any conflict, the latter will prevail. . . ." Sutherland, *Statutory Construction*, 4th Ed., Vol. 2(A), § 51.05, quoted in *Glover Construction Company v. Andrus*, 591 F.2d 554 (10th Cir. 1979), aff'd *Andrus v. Glover Construction Co.*, 446 U.S. 608 (1980). *See Amicus* Br., at 23-24. This general rule of statutory construction, however, has no place here; the specific mandate of § 514(d) provides with particularity how apparent conflicts between ERISA and other federal statutes are to be handled and therefore supersedes any contrary principles of statutory construction. § 514(d) does *not* say that nothing in ERISA shall be taken to "alter, amend, modify, invalidate, impair or supersede any [*specific*] law of the United States . . . or any rule or regulation issued under any such law;" it states that ERISA shall give way to *any* law, rule or regulation, and prescribes that submission not only when there is a direct conflict, but when

the other statute is simply "modified" or "impaired" by ERISA. Thus, if the LMRDA sanctions the constructive trust imposed here, it makes not a whit of difference whether it does so expressly or by incorporating a body of existing law. In either case, the propriety of the constructive trust remedy is a part of the federal statute, and the statute would be "impaired" if that remedy were not allowed.

Moreover, the application of the general rule of statutory interpretation to this case would support and not undermine the district court's decision. It is true that the LMRDA and ERISA are, indeed, *in pari materia*. Indeed, certain of ERISA's provisions echo and parallel those of the LMRDA. *See, e.g.*, 29 U.S.C. §§ 504(a) and 1111. The Government's further presumption, however, that it is ERISA which is the special act and the LMRDA which is general as applied to this case, is not correct. What is "general" and what is "special" is not constant for all purposes; it may vary according to the facts. In this instance, for example, if the subject matter were taken to be "pensions," one might argue that ERISA is a special statute and the LMRDA is general. However, since the subject matter is the appropriate remedy for breaches of trust by union officials, then it is the LMRDA which is specific and ERISA which is general: ERISA is a general statute addressing employee benefit plans, but it does not deal specifically with the problem of how employee benefit plans of faithless union officials are to be treated. The LMRDA, on the other hand, is directly concerned with assuring honesty in the administration and disposition of union funds and, as we have seen, the primary purpose of Title V of that statute was to assure effective remedies toward that end.

The government's second argument from general statutory construction principles is that Congress cannot have intended to permit the imposition of a constructive trust on the pension benefits of a corrupt union official under the LMRDA because that statute already existed prior

to the passage of ERISA, and no provision was made for this type of action specifically under ERISA. *Amicus* Br. at 24. The argument is also inconsistent with the specific directive provided by § 514(d). Under § 514(d), any such special mention of this one form of alienation would be redundant and confusing, since the language of the section specifically preserves *all* existing federal statutes (and the remedies thereunder) *except* those specifically enumerated. There would be no point to enacting a broad federal law savings clause and then listing specific statutes that are "saved."

Further, the history of the legislative treatment of the interplay of the anti-alienation clause and domestic support orders shows clearly that the Congress which passed ERISA did not think of everything, and highlights the danger always inherent in assuming intent from omission.[16] The mere fact that Congress did not address this specific form of alienation of pension rights pursuant to pre-existing Federal law therefore cannot be read to imply disapproval of such alienation.[17]

---

[16] After the passage of ERISA, the issue of whether a spouse's pension benefits could be dedicated to the use of the former spouse as part of a divorce settlement was hotly litigated around the country, with numerous state and federal courts holding that there was an implied exception to § 206(d)(1) for domestic support orders. *See e.g. A.T. & T. v. Merry, supra*, and cases cited therein. Congress ultimately codified this exception in 1984 in detailed amendments to § 206(d), confirming the belief of numerous observers, both judicial and otherwise, that the initial omission of an exception for qualified domestic relations orders was simply a mistake. 29 U.S.C. § 1056(d)(3).

See also Strobnicki v. Textron, supra, in which the court held that Congress could not have intended, in enacting the anti-alienation provision, to prevent the assignment of pension benefits in settlement of disputes about the proper beneficiary.

[17] Nor does the government's suggestion that the LMRDA savings clause, 29 U.S.C. § 523(a), preserves Guidry's rights under the ERISA anti-alientation provision fare any better. The LMRDA savings clause pertains to "any right . . . to which members of a labor organization are entitled under . . . other Federal law." But

II. BECAUSE OF THE CLOSE RELATIONSHIP BETWEEN GUIDRY'S LMRDA VIOLATIONS AND HIS BREACHES OF FIDUCIARY RESPONSIBILITY IN HIS ROLE AS TRUSTEE OF THE LOCAL FUNDS, ERISA ITSELF SUPPORTS IMPOSITION OF A CONSTRUCTIVE TRUST UPON GUIDRY'S PENSION BENEFITS.

The Tenth Circuit did not analyze this case as we have done in Part I, *supra*. Rather, the Tenth Circuit viewed this litigation as if it principally involved a breach of fiduciary obligation by Guidry in his role as trustee of union trust funds. Petitioner, and the government, are correct in pointing out that the Tenth Circuit's approach seems at some junctures to ignore the fact that the judgment in this case was entered under the LMRDA, not ERISA, and that the union and the jointly-trusteed funds are separate entities for legal purposes.

The further suggestion that Guidry's *only* breaches of trust involved the union, not the Trust Funds, and that consideration of ERISA fiduciary obligations is irrelevant to this lawsuit are, however, entirely incorrect. Rather, it is clear on this record that Guidry embezzled from the union *and* the trust funds, but did so in such a manner that it is hard to define precisely from which entity much of the money was stolen. Under these circumstances, it was appropriate for the Tenth Circuit to consider by analogy what the result would have been in this case had the underlying judgment been entered under ERISA rather than under the LMRDA. Guidry should not be better off by reason of the ERISA anti-alienation provision because the manner of his misconduct made disentangling his ERISA violations from his LMRDA violations an expensive and complex problem not worth the time and effort of the courts or the parties.

ERISA rights run not to "members of a labor organization" as such, but to *any* employees, some of whom, like Guidry, may happen also to be union members. That Guidry happened to be an employee *of the union* does not make his union membership any more relevant to the ERISA issue.

If Guidry were allowed such an advantage, other dishonest union officials would be provided an incentive to embezzle from unions instead of trust funds, or to disguise their embezzlements as such, thwarting the common purposes of ERISA and the LMRDA.

A. Contrary to the representations of the petitioner and the government, the record demonstrates that Guidry breached his fiduciary duty to the Local 9 Funds as well as to the union.

The government's *amicus* brief, at pp. 17-20, criticizes the Tenth Circuit's decision for "mischaracterizing" Guidry's actions as having involved embezzlements "from the pension fund," and maintains that "none of the plans involved in this litigation suffered any actual losses as a result of petitioner's actions." According to the government,

> [P]art of the $377,000 petitioner admitted to embezzling from the Union originated from the Employee Benefit Plans as payments from the Plans to the Union for administrative services. But when petitioner converted this money to his personal use, it had already been paid to the Union and belonged to the Union. The parties agreed that the Plans suffered no loss as a result of petitioner's embezzlement.

[*Amicus* brief, at 18.]

This version of the underlying facts is a much more substantial "mischaracterization" than any contained in the Tenth Circuit opinion. While *this* case was not a civil suit under ERISA, the Local Trust Funds *did* sue Guidry as a third party defendant in a state court action originally commenced by the union, claiming that Guidry had embezzled from the Local Funds both indirectly by diverting money that was in transit from the Funds to the union and directly. (J.A. 43-46). In the settlement agreement between the Local Funds and Guidry, Guidry admitted liability both for these thefts, and for attorneys fees, by consenting to the entry of judgment against him in the amount of $205,202.26 in favor of the

two Local Funds.[18] This settlement in favor of the trust funds in the state court action included so called "excess monies" of $85,176 paid by the Local Trust Funds for phantom administrative services. That money was diverted into Guidry's own account, and was clearly, simply, and flatly stolen from the Local Trust Funds. The judgment also included $75,000 of the "in transit" funds, that part of the balance of the union's claim against the funds which had been paid by the funds to the union to settle part of this triangular litigation.

As to that $75,000 and the balance of the money claimed by the union against the trust funds in the state court litigation, it will forever remain unclear whether Guidry stole it from the union or from the local funds. The parties expended considerable resources in attempting to have that dispute adjudicated.[19] (J.A. 44). But while the union and the trust funds are separate legal entities, the individuals making up the two groups, and therefore the individuals funding both sides of that litigation, are largely the same—the union members. That the officials of both the Union and the trust funds eventually determined not to spend vast sums of union members' money funding both sides of that litigation to obtain a final adjudication of that dispute only demonstrates that they, unlike Guidry, were faithful to their positions of trust. And the funds' settlement with Guidry, in which he accepted liability for major losses to the trust funds, rendered any separate federal court ERISA action against him establishing ERISA violations a purely academic exercise.[20]

---

[18] Of that judgment, however, Guidry agreed to pay only $20,000. (J.A. 46).

[19] The Welfare and Pension Funds alone spent $45,026.26 defending the Union's claims. (J.A. 45).

[20] The fact that Guidry clearly damaged both Local Funds distinguishes this case from *United Mine Workers v. Boyle*, 567 F.2d 112 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 956 (1978). In that

Further, the record unambiguously supports the conclusion that Guidry's actions in regard to the diversion of checks written by the Funds to the Union, whether theft from the Funds or not, were prohibited transactions as that term is defined in § 406 of ERISA, 29 U.S.C. 1106, and therefore a breach of Guidry's ERISA-imposed fiduciary responsibilities. That section states as follows:

> a) Except as provided in § 408:
>
> 1. A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect . . .
>
> D. Transfer to, or use by and for the benefit of, a party in interest of any assets of the plan . . .
>
> b) A fiduciary with respect to a plan shall not—
>
> 1. Deal with the assets of the plan in his own interest or for his own account.[21]

Whether Guidry did, in fact, deal with the assets of the plan in his own interest in violation of subsection (b)(1) is, the question raised above, i.e., from whom did he steal the money? There is, however, no ambiguity in his violation of subsection (a)(1)(D): As Chairman of the Board of Trustees of the Local 9 plans. Guidry clearly caused those plans to engage in transactions which he knew would lead directly *or indirectly* to his own acquisition of the assets of the plans. As such, he committed a prohibited transaction, thereby triggering the provisions of ERISA § 409(a). That provision, in turn, subjects the breaching fiduciary not only to the

---

case, decided under pre-ERISA law, and interpreting a spendthrift provision voluntarily agreed to by the parties to the plan, the court noted that Boyle was never a trustee of the Pension Trust, and that his wrongful act had no connection with that Trust. 567 F.2d at 114.

[21] "Party in interest" is defined at ERISA § 3(14) to include any fiduciary. Guidry was clearly a party in interest as to the Local 9 Pension Plan.

obligation to make good plan losses due to his breach, but "to such other equitable or remedial relief as the court may deem appropriate." ERISA § 409(a), 29 U.S.C. § 1109(a).

B. Since, under ERISA, the anti-alienation provision does not bar recovery of money received in breach of fiduciary obligations by a fund trustee who is also a fund beneficiary, the provision should also not be read to bar recovery from that same fund for breaches of fiduciary duty under the LMRDA intimately linked with ERISA breaches of trust.

Under the facts of this case and given the nature of the settlements previously reached between and among Local 9, the Trust Funds, and Guidry, it furthered the overall purposes of ERISA to impose a constructive trust upon Guidry's pension in favor of the Union.

In *Crawford v. La Boucherie Bernard*, 815 F.2d 117 (D.C. Cir. 1987), *cert. denied*, 108 Sup. Ct. 735 (1988), the D.C. Circuit addressed the narrow question of "whether, notwithstanding the . . . antialienation provisions of [ERISA], the Act authorizes a court to offset a party's interest in a plan covered by that statute against a judgment based on the party's breaches of duty to the same plan." 815 F.2d at 118.[22] That court's conclusion that ERISA does authorize such an offset was followed by the Tenth Circuit in this case, and is well supported by the structure and history of ERISA, read as a whole.

First, § 409 of ERISA, 29 U.S.C. § 1109, provides that an individual who breaches his fiduciary duties to an ERISA trust fund:

> shall be personally liable to make good to such plan any losses to the plan resulting from such breach. . . and shall be subject to such other equitable or remedial relief as the court may deem appropriate.

[22] As the government notes in its brief in this case (at 20 n.19), the Secretary of Labor was a party in *Crawford* and "supported the offset remedy on the ground that ERISA authorizes broad remedies to counter breaches of fiduciary duty by trustees of employee benefit plans. See 29 U.S.C. §§ 1109, 1132(a)(2)."

Second, as the D.C. Circuit noted,

> The legislative history of § 409 further underlines what is apparent from the statutory language. Thus, the Report of the Senate committee on Labor and Public Welfare provides that:
>
> > The enforcement provisions have been designed to provide both the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations. *The intent of the committee is to provide the full range of legal and equitable remedies available in both state and federal courts. . . .*
>
> S. Rep. No. 93-127, 93d Cong., 1st Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 4639, 4838, 4871 (emphasis added). Similarly Senator Harrison A. Williams, Chairman of the Committee, made clear the congressional direction to the federal courts to draw on principles of traditional trust law, stating that:
>
> > The objectives of these provisions are to make applicable the law of trusts. . . . to establish uniform fiduciary standards to prevent transactions which dissipate or endanger plan assets; and to provide effective remedies for breaches of trust.
>
> 120 Cong. Rec. S-15737, Aug. 22, 1974, *reprinted in* 1974 U.S. Code Cong. & Admin. News 5177, 5186; *see also Eaves v. Penn*, 587 F.2d 453, 462 (10th Cir. 1978).

815 F.2d at 119-120.

Thus, the intent of Congress in enacting the fiduciary obligations provisions of ERISA was similar to its intent in enacting Title V of the LMRDA: to provide a federal remedy for violations of trust, but one drawing upon the traditional law of trusts in defining the breadth of those remedies.

Third, under the traditional law of trusts, trustees who breach their fiduciary responsibility to the trust beneficiaries are often required to make up any financial losses to the beneficiaries from any beneficial interest of their own in the trust:

> If a beneficiary is also a trustee of his own trust, acting for himself and others, it is elementary that as trustee he owes the beneficiaries a duty to perform the trust and not to violate it, and that if he steals trust funds, *or causes damage to the trust estate in other ways*, his share under the trust . . . will be taken by the court in order to make good the loss.

[Emphasis added.]

Bogert, *Trusts and Trustees* § 191 (2d ed. 1979) at 484. *See also* III *Scott on Trusts*, § 257 (3d ed. 1967) at 2201.[23]

The fact that the particular trust involved may be a spendthrift trust, subject to an anti-alienation provision, does not serve to prevent trustees or co-beneficiaries from reaching a faithless trustee's beneficial interest in the trust, at least unless the trust documents expressly state otherwise:

> The trustee of a spendthrift trust may withhold the income due a beneficiary who was also a co-trustee to make good breaches of trust committed by the beneficiary when he was a co-trustee. *The*

[23] Professor Scott writes:

> [I]f the trustee is also one of the beneficiaries . . . the other beneficiaries can compel him to make good the breach of trust out of his beneficial interest in the trust property. The defaulting trustee is not entitled to receive his share of the trust property until he has made good the loss which resulted from his breach of trust.

Cases applying this principle include *In re Van Nostrand's Will*, 29 N.Y.S. 2d 857 (Sup. Ct. 1941); *In re Watson*, 449 N.E. 2d 1156 (Ind. Ct. App. 1983); *In re Bereton's Estate*, 130 A.2d 453 (Pa. 1957).

> *trustee's claim on this account . . . may be collected out of the beneficiary's interest in any trust created by the same will, even though it is not the particular trust to which the breach of trust related.* [Emphasis added.]

E. Griswold, *Spendthrift Trusts*, § 417 (2d ed. 1947) at 416-47. *See also, e.g., Restatement (Second) of Trusts*, § 257 comment f; III *Scott on Trusts*, § 257.1; *cf. In re Burr*, 257 N.Y.S. 654 (Sup. Ct. 1932), aff'd, 263 N.Y.S. 945 (N.Y. App. Div. 1933).

Thus, as the D.C. Circuit concluded in *Crawford, supra*:

> In short, the offset remedy . . . is not only consistent with ERISA's purpose of providing effective remedies for fiduciary breaches, but it is also among the traditional trust principles that Congress intended to be incorporated into the law of employee benefit plans under ERISA.

815 F.2d at 120.

As is evident from comparing the *Crawford* analysis of ERISA principles with the LMRDA history and analysis provided in Part I, *supra*, the two statutes are basically parallel in their intent, first, to assure adequate remedies to employee trust fund beneficiaries, on the one hand, and union members, on the other; and, second, to incorporate basic trust principles in doing so. Further, while the union and the trust funds partially administered by the union are separate entities, the actual *individuals* who are members of the unions and beneficiaries of the trust funds are for the most part the same. Finally, Guidry was a fiduciary *both* of the union and of the trust funds; he held the latter position by virtue of appointment by the union; and he was able to commit many of the acts upon which his liability is based precisely because of his dual role.

Under these circumstances, to hold that ERISA would permit the trust funds themselves to reach Guidry's pen-

sion benefits, yet bars the same remedy for a closely related breach of trust under the LMRDA is insupportable.

The constructive trust imposed by the district court upon Guidry's pension benefits is not in fundamental tension with ERISA. To the contrary, that remedy is precisely parallel to the remedy that would be appropriate for parallel violation of ERISA itself. In addition, that constructive trust serves at least in part, to recompense the union for funds that Guidry took in violation of *both* ERISA and the LMRDA by virtue of his dual role as trustee of both the union and the trust funds.

Consequently, while the constructive trust in this case was imposed under the LMRDA, and not under ERISA, it is consistent with the basic remedial principles of ERISA and forwards the overall purposes of that statute. For that reason alone, independent of § 514(d), this court should sustain the constructive trust. Also, particularly given the general intent of Congress when passing ERISA to preserve other federal statutes, expressed in § 514(d), ERISA should be construed as preserving remedies under other federal statutes that forward the purposes not only of that statute, but of ERISA as well.

It is, indeed, little more than a cruel irony for Guidry to invoke ERISA's goal of protecting the wellbeing of working people to support his right to enjoy a pension which he earned during more than a decade of looting the working people who placed their faith in him and whom he mockingly addressed as "brother." The true purposes of ERISA will be more properly served as to the hundreds of members of Local 9 from whom Guidry stole if restitution is made to their union, through the medium of the trust imposed by the District Court. The Court should not be misled by disingenuous appeals by Guidry to a purported Congressional polity to protect *him*.

III. THE IMPOSITION OF A CONSTRUCTIVE TRUST IN THIS CASE IS NOT AN EQUITABLE PROCESS THROUGH WHICH GUIDRY'S EARNINGS ARE REQUIRED TO BE WITHHELD FOR THE PAYMENT OF DEBT AND THEREFORE IS NOT COVERED BY THE CONSUMER CREDIT PROTECTION ACT.

The petitioner and the government all presume without discussion that the imposition of a constructive trust is subject to the garnishment restrictions in the Consumer Credit Protection Act ("CCPA"). 15 U.S.C. § 1671 *et seq.* Properly analyzed, however, a constructive trust is not a garnishment, and is not subject to the CCPA.

The CCPA defines "garnishment" as "any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt." 15 U.S.C. § 1672(c). However, the Tenth Circuit decision in the present case is the only reported case even to have noted the question of whether the imposition of a constructive trust falls within this definition, and it does not actually decide that question. ("Furthermore, "garnishment" . . . *could* encompass the constructive trust levied in this case." (J.A. 115.)) (Emphasis added).[24]

Other authorities, however, addressing the question of the nature of a constructive trust in other contexts, have recognized that a constructive trust identifies the rightful owner of property *prior* to commission of any fraud, and simply declares that he was not divested of title by the fraudulent activity. By imposing a constructive trust here, the district court declared that Guidry *never* had any legitimate interest in the contributions made to the

---

[24] The Tenth Circuit instead rested its decision on the CCPA issue on a state law procedural issue which respondents did not raise below and are not asserting here. As a result the Court below did not reach the merits of the CCPA dispute. Therefore, this Court may wish to remand the CCPA issue to allow the Tenth Circuit to decide the merits in the first instance.

three pension plans, since those contributions were the direct fruit of his fiduciary violations. This proposition is fully demonstrated in Part I.B. above, and is consistent with the traditional notion that a constructive trust arises immediately at the time of the fraud:

> The beneficial interest in the property is from the beginning in the person who has been wronged. The constructive trust arises from the situation in which he is entitled to the remedy of restitution, and it arises as soon as that situation is created. . . . It would seem that there is no foundation whatever for the notion that a constructive trust does not arise until it is decreed by a court. It arises when the duty to make restitution arises, not when the duty is subsequently enforced.

V *Scott on Trusts*, *supra*, § 462.4 at 323. Thus, Guidry's rights to his compensation and benefits were subject to a constructive trust immediately upon each embezzlement, and the contributions to the plans were never his.

In rejecting Guidry's claim for a 75% exemption under the CCPA, the district court also observed the traditional law regarding constructive trusts providing that

> the claimant may follow his property into its product even though the product is property that is *exempt from execution.*

[Emphasis added.] See p. 20, *supra*. V *Scott on Trusts*, *supra*, § 508.3, pp. 569-574.

Professor Scott illustrates this principle with the example of a wrongdoer who purchases a home with misappropriated funds, lives in it, and claims a homestead exemption. Scott concludes:

> The mere fact that the property acquired could not be reached by the general creditors of the wrongdoer is immaterial; the policy in favor of exempting the property from the claims of creditors is not applicable as against the person whose property was used in acquiring it. Clearly it would be against public policy to permit a person who misappropriates the property of another to retain the benefit of the misappropriation by using the property or its proceeds in acquiring a homestead or other property that is exempt from the claims of general creditors.

V *Scott on Trusts*, *supra*, § 508.3 at 570.

As is argued above in Part I(B), Guidry, as chief executive of the union, controlled the payment of his contributions into the funds and breached his fiduciary duties in doing so, causing himself to be doubly compensated. Clearly, Guidry could not shelter his embezzlements by voluntarily depositing embezzled funds into the plan. The result should be no different with the proceeds of his fiduciary breaches.

Where appropriate, courts have commonly imposed constructive trusts on salaries without consideration of the CCPA or comparable state law limitations. For example, in *Banks v. Bryant*, 497 So.2d 460 (Ala. 1986) the Alabama Supreme Court found that corporate fiduciaries had wrongfully diverted a business opportunity from the corporation to their own personal business venture. The court impressed a constructive trust on

> the net value of the proceeds earned by these Defendants . . . *including salaries*. . .

from that venture. 491 So.2d at 465 [emphasis added]. The Colorado Supreme Court also sustained a constructive trust imposed against the past salary of a businessman who committed fraud against his partner. *Hooper v. Yoder*, 737 P.2d 832 (Colo. 1987).

In *Borden v. Sinskey*, 530 F.2d 478 (3rd Cir. 1976), the Third Circuit imposed a constructive trust upon the salaries earned by a corporate officer for services rendered to three competing entities in whose behalf he had usurped corporate opportunities from the original corporation. The court subjected *all* salary with the competing entities to the constructive trust, disallowing the breaching corporate fiduciary even reasonable value for his services with those entities. *Sinskey*, *supra*, 530

F.2d at 497, 498. The court stated the purpose of doing so, quoting from *Guth v. Loft Inc.*, 23 Del. Ch. 255, 5 A.2d 503 (Sup. 1939) as follows:

> "If an officer or director of a corporation, in violation of his duty as such, acquires gain or advantage for himself, the law charges the interest so acquired with a trust for the benefit of a corporation, . . . while *it denies to the betrayer all benefit and profit.* The rule, inveterate and uncompromising in its rigidity, does not rest upon the narrow ground of injury or damage to the corporation resulting from a betrayal of confidence, but upon a broader foundation of a wise public policy that, for the purpose of removing all temptation, extinguishes all possibility of profit flowing from a breach of the confidence imposed by the fiduciary relations." 5 A.2d at 510. [Emphasis added].

As is argued above in part I, Guidry's pensions are a gain or advantage which he acquired by his fiduciary breaches. Had he accounted to the union, as required by 29 U.S.C. § 501, he would not have earned his pensions. If Guidry receives his pension benefits, those benefits would represent a reward for his breaches of trust.

The courts which deprived breaching fiduciaries of their salaries appear not to have considered the CCPA directly. In some instances the salaries had already been received, and may not have been subject to the CCPA. However, the application of that statute to any future salaries would have defeated the entire purpose of the equitable remedy imposed and would have contravened the premise of a constructive trust—that such a trust identifies the rightful owner of property which was wrongfully obtained in the first instance and accords that rightful owner the proceeds of the trust.

The decision of this Court in *Ridgway v. Ridgway*, 454 U.S. 46 (1981) is not contrary. The Court in that case reversed the imposition of a constructive trust on the proceeds of a life insurance policy covered by the

Servicemen's Group Life Insurance Act of 1965 (the "SGLIA"). The constructive trust in that instance had been imposed in favor of the decedent's children from his first marriage who were to receive life insurance proceeds under a Maine divorce decree. The decedent had named his second wife as the policy beneficiary in violation of the decree. The Court held the constructive trust inconsistent with the anti-attachment provision of the SGLIA.

In *Ridgway*, however, the court stressed that the trust had not been imposed on the proceeds of fraud or breach of trust. Rather, the policy proceeds were Sergeant Ridgway's to dispose of under federal law. 454 U.S. at 58 and 59. The court expressly reserved ruling on whether extreme facts, such as fraud, might compel a contrary result. 454 U.S. at 60 fn. 9. Indeed the court distinguished *Yiatchos v. Yiatchos*, 376 U.S. 306 (1964), on the basis that actual fraud may have been involved there. 454 U.S. at 58 and 59.[25] Further, in the present case, the constructive trust was imposed to remedy fraud prohibited by federal law, whereas in *Ridgway*, state law provided its basis.[26]

---

[25] See also *Mendez-Bellido v. Board of Trustees*, 709 F. Supp. 329 (E.D. N.Y. 1989), which emphasized this aspect of the *Ridgway* decision in holding that ERISA does not preempt New York state law forbidding a murderer from benefitting from her crime. The court held that decedent's second wife, convicted of second degree manslaughter of her husband, could not lay claim to his pension as against other spouses and children under the joint and survivor annuity provisions of ERISA.

[26] The argument that a constructive trust does not take property away from its legal owner, but is instead a court-imposed recognition that title should never, in equity, have come to rest in the legal owner is equally applicable to ERISA § 206(d)(1). Just as the provisions of the Consumer Credit Protection Act are not implicated by the imposition of a constructive trust, so too, is ERISA's anti-alienation provision unaffected by this equitable device for the prevention and correction of fraud. The constructive trust imposed by the district court would not "alienate" Guidry's pension. Rather, that trust represents a finding that the con-

If Guidry succesfully exempts 75% of the pension benefits he calls his in spite of the longstanding principles of the constructive trust, he will realize a considerable profit directly attributable to his fiduciary breaches.[27] In so doing, Guidry would undermine the purposes of the LMRDA, and would perpetuate his betrayal of the union and its members for as long as he lives.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

JOSEPH M. GOLDHAMMER *
WALTER C. BRAUER III
ELLEN M. KELMAN
BRAUER, BUESCHER, VALENTINE,
GOLDHAMMER, KELMAN, P.C.
1563 Gaylord
Denver, CO 80206
(303) 333-7751
Counsel for Respondents

* Counsel of Record

---

tributions giving rise to Guidry's pension were never his to begin with because of the circumstances under which they were made.

[27] Setoffs of pension payments or other earnings are not subject to the garnishment restrictions of the CCPA because a setoff is not a judicial transaction. *Atwater v. Roudebush*, 452 F. Supp. 622 (N.D. Ill. 1976); c.f. *Western v. Hodgson*, 494 F.2d 379 (4th Cir. 1974); and *Bache Halsey v. Killop*, 589 F. Supp. 390 (E.D. Mich. 1984). As discussed in part II above, setoffs are also not affected by ERISA's anti-alienation provision. Therefore, under the particular facts of this case involving Guidry's dual breaches of fiduciary duties, Guidry should not be better off under either ERISA or the CCPA because the manner of his misconduct made determining whether he stole from the Union or the Local Funds complicated and economically prohibitive. Under these circumstances, a constructive trust is the appropriate remedial device to prevent Guidry from benefiting under either statute from the fact that, due to complexities for which he is responsible, the money he stole is now being collected by the Union, not the Local Funds.

REPLY

BRIEF

Supreme Court, U.S.
FILED
OCT 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1105

In The

Supreme Court of the United States

October Term, 1988

CURTIS GUIDRY,

Petitioner,

v.

SHEET METAL WORKERS NATIONAL PENSION FUND; SHEET METAL WORKERS' LOCAL UNIONS AND COUNCILS PENSION PLAN; SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 9; SHEET METAL WORKERS LOCAL NO. 9 PENSION FUND; et al.,

Respondents.

On Writ of Certiorari
To The United States Court of Appeals
For the Tenth Circuit

PETITIONER'S REPLY BRIEF

ELDON E. SILVERMAN*
SCOTT GELMAN
SILVERMAN AND GELMAN, P.C.
1600 Stout, Suite 1000
Denver, Colorado 80202
(303) 573-5266

KENNETH T. EICHEL
ROBERT E. PENNINGTON
ELROD, KATZ, PREEO & LOOK, P.C.
1120 Lincoln, Suite 1100
Denver, Colorado 80203
(303) 832-1900

Counsel for Petitioner

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Table of Authorities ii

Argument 1

1. The Union Does Not Seek to Uphold The Tenth Circuit's Rationale for a Criminal Miconduct Exception to ERISA's Anti-Alienation Clause ... 1

2. The General Language of "Other Appropriate Relief" in Section 501(b) of the LMRDA Does Not Defeat the Anti-Alienation Clause of ERISA 3

3. The Union Asserts Facts That Were Not Proved Below in an Attempt to Avoid the Impact of the Anti-Alienation Clause 7

4. Contrary to the Union's Argument, the Constructive Trust is an Equitable Remedy Clearly Subject to the 75% Exemption in the Consumer Credit Protection Act 10

Conclusion 12

TABLE OF AUTHORITIES

Page

CASES:

Bldg. Material & D. Tr. Dr., Local 420 v. Traweek, 867 F.2d 500 (C.A. 9, 1989) 6

Daniel v. Inter. Broth. of Tmstrs., Chauf., Etc., 561 F.2d 1223 (C.A. 7, 1977) 4

First Nat'l. Bank of Denver v. Columbia Credit Corp., 499 P.2d 1163 (Colo. 1972) 12

St. Paul Fire & Marine Ins. Co. v. Cox, 752 F.2d 660 (C.A. 11, 1985) 2

Teamsters v. Daniel, 439 U.S. 551 (1979) 4

United Mine Workers of America v. W.A. Boyle, 567 F.2d 112 (D.C. Cir., 1977), cert. denied, 435 U.S. 956 (1978) 3, 4

STATUTES:

Consumer Credit Protection Act, 82 Stat. 163, 15 U.S.C. 1671, *et seq:*

15 U.S.C. § 1671 10

15 U.S.C. § 1672(a) 11

15 U.S.C. § 1672(c) 11

Employee Retirement Income Security Act of 1974, 88 Stat. 829, 29 U.S.C. 1001, *et seq:*

29 U.S.C. § 1056(d)(1) 2

29 U.S.C. § 1103(c)(1) 9

29 U.S.C. § 1106 9

29 U.S.C. § 1109(a) 9

29 U.S.C. § 1144(d) 3, 4

TABLE OF AUTHORITIES – Continued

Page

Fair Labor Standards Act, 52 Stat. 1060, 29 U.S.C. § 201, *et seq.* 4

Federal Fair Credit Reporting Act, 84 Stat. 1128, 15 U.S.C. § 1681, *et seq.* 4

Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U.S.C. § 401, *et seq:*

29 U.S.C. § 401, *et seq.* 3

29 U.S.C. § 501(a) 5, 6

29 U.S.C. § 501(b) 3, 6

Securities Exchange Act of 1934, 48 Stat. 891, 15 U.S.C. § 78j(b) 4

TREATISES

Scott On Trusts, 4th Ed. (1989) 7

No. 88-1105

In The

Supreme Court of the United States

October Term, 1988

CURTIS GUIDRY,

Petitioner,

v.

SHEET METAL WORKERS NATIONAL PENSION FUND; SHEET METAL WORKERS' LOCAL UNIONS AND COUNCILS PENSION PLAN; SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 9; SHEET METAL WORKERS LOCAL NO. 9 PENSION FUND; et al.,

Respondents.

On Writ of Certiorari
To The United States Court of Appeals
For the Tenth Circuit

PETITIONER'S REPLY BRIEF

ARGUMENT

1. THE UNION DOES NOT SEEK TO UPHOLD THE TENTH CIRCUIT'S RATIONALE FOR A CRIMINAL MISCONDUCT EXCEPTION TO ERISA'S ANTI-ALIENATION CLAUSE.

In its Brief before this Court, Respondent Union disavows a large portion of the Tenth Circuit's Opinion (J.A.

102-118). For instance, on page 32 of its Brief, the Union concedes that, "(T)he Tenth Circuit did not analyze this case as we have done in Part I, *supra*," with Part I covering pages 11 through 31 of the Union's Brief. The Union admits on page 32 of its Brief that Guidry, as well as the government, "are correct in pointing out that the Tenth Circuit's approach seems at some junctures to ignore the fact that the judgment in this case was entered under the LMRDA, not ERISA, and that the union and the jointly-trusteed funds are separate entities for legal purposes."

Based upon this concession, the Union does not even mention the case of *St. Paul Fire & Marine Ins. Co. v. Cox*, 752 F.2d 550 (C.A. 11, 1985). *St. Paul Fire & Marine Ins. Co.* is the primary case cited by those courts which have judicially carved out a criminal misconduct exception to the broad anti-alienation clause of ERISA. Further, in its Brief, the Union does not seek to refute Guidry's position that on pages 14 through 22 of Petitioner's Opening Brief that (a) the language of ERISA Section 206(d) (1), 29 U.S.C. § 1056(d), that benefits "may not be assigned or alienated" is clear and self-evident, and that, (b) the legislative history, as well as subsequent administrative interpretation, compel the conclusion that the provision means what it says.

However, in an attempt to uphold the constructive trust, the Union poses new arguments heard for the first time in its Brief and engages in wishful musings as to what the facts and law should be to vindicate the Union and further excoriate Guidry. These arguments are inaccurate and too late.

2. THE GENERAL LANGUAGE OF "OTHER APPROPRIATE RELIEF" IN SECTION 501(b) OF THE LMRDA DOES NOT DEFEAT THE ANTI-ALIENATION CLAUSE OF ERISA.

The Union's principal new argument is that Section 501(b) of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. § 401, *et seq.*, provides for "other appropriate relief," and that the constructive trust was in fact such relief. The argument continues that since Section 514(d) of ERISA, 29 U.S.C. § 1144(d), provides that ERISA shall not "impair, or supersede any law of the United States," that ERISA would be doing just that if its anti-alienation clause prohibited a constructive trust on a LMRDA Section 501(b) judgment.

The Union cannot cite one case arising under LMRDA in which a constructive trust was placed on a pension fund. To the contrary, there is existing authority, *United Mine Workers of America v. W.A. Boyle*, 567 F.2d 112 (D.C. Cir., 1977), cert. denied, 435 U.S. 956 (1978) that clearly holds that LMRDA is not a bar to the payment of pension funds in the face of a spendthrift clause. The Court in *United Mine Workers of America v. W.A. Boyle* did not seek to exonerate Boyle, but rather held that there was no public policy, implicit or explicit in LMRDA, which should cause the court to create another exception to the usual rule on spendthrift provisions. Likewise, there is no reason to allow general language in LMRDA referring to "other appropriate relief" to overcome the specific Congressionally imposed mandate of the anti-alienation clause in ERISA, namely, that pensions should be protected from alienation. The Union deals with

United Mine Workers of America v. W.A. Boyle only in a footnote on pages 34 and 35 of its Brief by asserting that it can distinguish this case, claiming that Guidry "clearly damaged" both Local Funds. As will be discussed in the next section of this Brief, this argument fails because the Local Funds have released Guidry in a judicial settlement, and it has never been judicially proved that Guidry embezzled any sums from the Local Funds or the two other Pension Funds.

If the Union's logic prevails that LMRDA Section 501(b) gives it unfettered rights to collect its judgment, despite any exemption obstacle, then such an argument could clearly be used by any creditor of a judgment arising under any federal law. Any argument of a "narrow exception" to ERISA for unions only, would be lost. There are innumerable federal statutes that could give rise to judgments, including but not limited to the Securities Exchange Act of 1934, 48 Stat. 891, 15 U.S.C. § 78j(b), the Federal Fair Credit Reporting Act, 84 Stat. 1128, 15 U.S.C. § 1681, *et seq.*, and the Fair Labor Standards Act, 52 Stat. 1060, 29 U.S.C. § 201, *et seq.* If the Union's broad reading of the saving clause in ERISA Section 514(d) were accepted, then the anti-alienation clause would be effectively gutted, since every judgment creditor holding a judgment arising out of a federal statute would claim that collection was "impaired" by the anti-alienation clause. This Court resisted such an expansive reading of Section 514(d), in *Teamsters v. Daniel*, 439 U.S. 551 (1979). The United States Court of Appeals for the Seventh Circuit had ruled, among other things, in *Daniel v. Inter. Broth. of Tmstrs., Chauf., Etc.*, 561 F.2d 1223, 1246-1247 (C.A. 7, 1977), that Section 514(d) demonstrated that ERISA did

not pre-empt rights of a participant to sue under the Federal Securities Acts. In reversing the Court of Appeals, this Court held at P.569 as follows:

> Unlike the Securities Acts, ERISA deals expressly and in detail with pension plans. ERISA requires pension plans to disclose specified information to employees in a specified manner, see 29 U.S.C. § 1021-1030, in contrast to the indefinite and uncertain disclosure obligations imposed by the antifraud provisions of the Securities Acts . . .

The Court further concluded at P.570 that, "(N)ot only is the extension of the Securities Acts by the court below unsupported by the language and history of those Acts, but in light of ERISA it serves no general purpose."

It should also be pointed out that the Union did obtain the relief it sought under LMRDA, since Guidry stipulated to a judgment arising out of the first five claims for relief of the Union, including the LMRDA Section 501(a) claim (J.A. 54). The Union is simply frustrated that it cannot collect that judgment against at least three assets of Guidry, namely, his three pensions, because of the anti-alienation clause of ERISA. The anti-alienation clause of ERISA acts like an exemption, declaring the legislative purpose, despite the existence of a judgment, that certain assets of the judgment debtor and his family, are exempt for public policy purposes. Thus, it cannot be argued that the anti-alienation clause impairs the judgment. Rather, the anti-alienation clause upholds a separate public policy embodied by ERISA that pension benefits should be available to the participants and their

beneficiaries, who may well be innocent of any wrongdoing. It was Guidry who committed the wrongs, who was fined and who went to prison, not his beneficiaries.

In arguing the application of Section 501(b), the Union fails to read the actual words of the Section. The actual text of the section relating to "other appropriate relief" is clear that it is only in favor of individual union members, *if* the union, its board, or officers first "refuse or fail to sue . . . " The facts of this case are that the Union did sue Guidry in this instant action, and for its First Claim for Relief, the Union sought a judgment under LMRDA Section 501(a), not Section 501(b) (J.A. 32-33). This is understandable, since only if the Union failed to act, would an individual member be able to sue under Section 501(b) for "other appropriate relief." *See, Bldg. Material & D. Tr. Dr., Local 420 v. Traweek*, 867 F.2d 500, 506-507 (C.A. 9, 1989). Thus, there is no reason for this Court to even consider whether the impairment language of ERISA applies to a LMRDA Section 501(b) judgment, since such a judgment could not be obtained in this case. Also, under principles of legislative construction, a convoluted construction of Section 501(b) should not overcome a specific and clear legislative direction in the anti-alienation clause of ERISA.

Even if the LMRDA's indefinite authorization of "other appropriate relief" could in a proper case override the specific anti-alienation provisions of ERISA, this is not such a case. The Union relies heavily on discussion of the device of a constructive trust in the legislative history of the LMRDA and on citations to authorities on the law of trusts. But as those references make clear, they involve the use of such a device only when the claimant is seeking to follow his stolen or misappropriated property into

its product. See, e.g., *Scott on Trusts* § 508.3 (1989). Despite the Union's efforts to argue that this is such a case, it is forced to concede at page 7 of its Brief that "the contributions deposited in the pension funds did not come directly from the embezzled checks." Thus, none of the Union's copious citations supports the imposition of the constructive trust in these circumstances.

3. THE UNION ASSERTS FACTS THAT WERE NOT PROVED BELOW IN AN ATTEMPT TO AVOID THE IMPACT OF THE ANTI-ALIENATION CLAUSE.

On page 11 of its Brief, the Union asserts that, "this case was, and should be, resolved upon a much narrower basis, grounded in its actual facts." To the contrary, the Union then seeks to argue various unsupported factual and legal positions.

In its argument, the Union attempts to blur any distinction between itself and the three Pension Funds, in order to imply that if the Pension Funds had rights against Guidry, then the Union should have its constructive trust to vindicate the union membership. In fact, as pointed out in Petitioner's Opening Brief, on pages 30 and 31, the Pension Funds and the Union took opposite positions in the District Court. The Pension Funds' Motions for Summary Judgment sought a forfeiture so that the Pension Funds could retain Guidry's benefits; whereas, the Union argued against forfeiture, since it wanted benefits to be awarded to Guidry, so that the constructive trust could be imposed on them.

In Section II of its Brief, on pages 32-40, the Union asserts that the constructive trust is supportable to vindicate the rights of all three Pension Funds because Guidry breached fiduciary duties to the "Local Funds." The record below is clear that Guidry was a trustee of only *one* of the three Pension Funds over which the constructive trust was imposed (J.A. 20). Thus, it takes a broad brush indeed to suggest that Guidry should be deprived of pensions from the two other Pension Funds in which he was not an official, trustee or fiduciary.

The attempted assertion even on behalf of the one Local Pension Fund, neglects the fact that this Fund reached an agreement with Guidry which satisfied any claim that the Local Fund could have against Guidry, in exchange for Guidry's consenting to payment of $20,000.00 of his Local 9 pension to a third party (J.A. 43-46). As part of the settlement, the Local Fund agreed "to the reinstatement of payments to Guidry from his ERISA pension fund . . . (J.A. 46).

A further irony of the Union's position is that the Pension Funds did not even assert in this action that Guidry stole money from them. The Pension Funds were represented by Raymond J. Sweeney, Esq. before the District Court (App. to Pet. for Cert. C-1). During the hearing on the various Motions for Summary Judgment, the District Judge asked Mr. Sweeney to confirm that his clients did not have any counterclaims. Mr. Sweeney answered, "That's correct, Your Honor." Then the following exchange took place:

> THE COURT: You don't have a basis for recovering back from Guidry?

> MR. SWEENEY: No, Your Honor.
>
> THE COURT: Okay.
> (App. to Pet. for Cert. C-11)

In an effort to create a record that does not exist, the Union asserts on page 35 of its Brief that Guidry violated the "prohibited transaction" language of ERISA Section 406, 29 U.S.C. § 1106, giving rise to claimed remedies under Section 409(a) of ERISA, 29 U.S.C. § 1109(a). This assertion is at war with the record. First, there was no assertion in the Court below, either in the Complaint by Intervenor Union (J.A. 29-36) or in its Motion for Summary Judgment (J.A. 72) that Guidry had violated these sections of ERISA. The Union certainly cannot wait until the Supreme Court to assert this. Even if it had attempted to do so, the only Pension Fund to which Guidry was a fiduciary, was Sheet Metal Workers Local No. 9 Pension Fund (J.A. 20), which had resolved its state court litigation with Guidry and resumed payments of his pension (J.A. 43-46).

ERISA itself contains a strong prohibition against the Union justifying its taking of the pensions, as vindicating the rights of the Funds. As the United States points out in its *Amicus* Brief, at P.16, ERISA safeguards pension benefits by directing that, "the assets of a plan shall never inure to the benefit of any employer . . . " 29 U.S.C. § 1103(c)(1). As the Union begrudgingly admits on pages 24 and 34 of its Brief, it indeed is a separate legal entity from the Pension Funds. It cannot now try to justify the constructive trust in which it receives funds as benefiting separate legal entities, namely, the Pension Funds.

Lastly, the arguments of the Union, on pages 32 through 40, go against the very grain of the appellate process, namely, that appellate courts should decide cases based on the record below. Despite its repeated assertion that Guidry breached its duties as a fiduciary to one of the three Pension Funds, the Union sheepishly admits, " . . . it will forever remain unclear whether Guidry stole it from the Union or from the Local Funds." (J.A. 34). The Union admits that the so-called ERISA violations were not judicially proved in the Court below when the Union asserts at page 32 of its Brief that, " . . . disentangling his ERISA violation from his LMRDA violations (would be) an expensive and a complex problem not worth the time and effort of the courts or the parties" (words in parenthesis added). This is just another example of why we are a nation of law and not conjecture.

4. CONTRARY TO THE UNION'S ARGUMENT, THE CONSTRUCTIVE TRUST IS AN EQUITABLE REMEDY CLEARLY SUBJECT TO THE 75% EXEMPTION IN THE CONSUMER CREDIT PROTECTION ACT.

The Union also disavows the Tenth Circuit's holding that Guidry did not properly raise his 75% exemption arising under the Consumer Credit Protection Act, 15 U.S.C. § 1671, *et seq*. The Tenth Circuit had ruled that Guidry procedurally failed to claim his exemption. In Petitioner's Opening Brief, Guidry pointed out on pages 34 through 40, that the three Pensions Funds had not calculated the exemptions, based on the Funds' position that no pension was due to Guidry. Guidry in turn had no duty to object to a nonexistent calculation of exempt

earnings. As to this issue, the Union concedes in footnote 24 on page 41 that, "(T)he Tenth Circuit instead rested its decision on the CCPA issue on a state law procedural issue which respondents did not raise below and are not asserting here."

To uphold its position, the Union asserts in the heading to argument III on page 41 that the constructive trust in this case "is not an equitable process." Earlier in the Brief, on page 10, the Union admits that constructive trusts are "an equitable tool for preventing and correcting fraud." Indeed, the Sixth Claim for Relief in the Complaint by the Union, which seeks a constructive trust, asked the Court to exercise "its equitable powers" (J.A. 35). The Consumer Credit Protection Act defines "garnishment" as "any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt." 15 U.S.C. § 1672(c). Further, the definition of "earnings" clearly includes "periodic payments pursuant to a pension or retirement program." 15 U.S.C. § 1672(a). The language of the statute is very inclusive. The Union, however, wishes to argue the common law of trusts.

This argument can be refuted. First, there was never a judicial determination that Guidry's funds in the pension contain stolen money. As earlier pointed out, Guidry was not even an official or fiduciary of two of the three Pensions Funds. As to the third Pension Fund, he reached a settlement and payments of the pension resumed. As to the Union, its judgment for $275,000.00 upon which the constructive trusts rests, is for loss of Union money, not pension money (J.A. 54).

Secondly, the common law of trusts is pre-empted by the Consumer Credit Protection Act. This is recognized in Colorado in *First Nat. Bank of Denver v. Columbia Credit Corp.*, 499 P.2d 1163, 1164 (Colo. 1972), where the Colorado Supreme Court acknowledged that, "Congress has expressly preempted the garnishment field as it relates to salaries and wages." Here, the statute defining "earnings" includes pension proceeds, and the definition of "garnishment" includes equitable proceedings.

The Union has suggested in footnote 24 on page 41 of its Brief that this Court may wish to remand the Consumer Credit Protection Act exemption issue to the Tenth Circuit. While all sides in this appeal admit that there is no support for the Tenth Circuit's position that Guidry failed to assert his exemption rights, the decision of whether the 75% exemption under the Consumer Credit Protection Act applies in this case is a purely legal issue in the context of this case. It is requested that the Court decide the Consumer Credit Protection Act coverage issue in the event the Court does uphold the constructive trust on other grounds. This Court has the power to determine such a legal issue, without the necessity of remand.

CONCLUSION

For the foregoing reasons and those stated in the Opening Brief, it is respectfully requested that the decision of the Court of Appeals be reversed, with direction to dissolve the constructive trust and reinstate Guidry's benefits under all three Pension Funds, along with the

determination of his claim for interest, costs, and reasonable attorney's fees arising under ERISA. In the alternative, if the constructive trust is upheld, it is respectfully requested that the ruling of the Court of Appeals be reversed on the Consumer Credit Protection Act exemption issue, with direction to the lower Courts to order the Pension Funds to calculate exempt earnings and pay over to Guidry nonexempt earnings wrongfully deprived, along with interest and other appropriate relief.

October, 1989

Respectfully submitted,

ELDON E. SILVERMAN
SCOTT GELMAN
SILVERMAN & GELMAN, P.C.
1600 Stout, Suite 1000
Denver, Colorado 80202
(303) 573-5266

KENNETH T. EICHEL
ROBERT E. PENNINGTON
ELROD, KATZ, PREEO & LOOK, P.C.
1120 Lincoln, Suite 1100
Denver, Colorado 80203
(303) 832-1900

(Counsel for Petitioner)